87-1358

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.,
and
SILVER CONSTRUCTION, INC.,

Petitioners

v.

M. MARK MENDEL, Individually
DANIEL E. MURRAY, Individually, and
M. MARK MENDEL, Limited,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming dismissal of a RICO claim on the ground that the Complaint had failed adequately to allege a pattern of racketeering, where the Complaint alleged that defendants had committed multiple predicate acts in the course of a six month campaign of attempted extortion, threats of physical harm, and mail fraud and which culminated in obstruction of justice and the filing of an utterly fraudulent bankruptcy petition which destroyed petitioner's business?

2. Whether, assuming the Court of Appeals' restrictive interpretation of the "pattern of racketeering" requirement was proper, it erred in refusing petitioners' request to be permitted to amend the Complaint to allege that defendant had engaged in a second, separate scheme having different victims as evidence of defendants' more pervasive pattern of racketeering?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Marshall-Silver Construction Company, Inc. and Silver Construction, Inc. (collectively "Marshall-Silver"), plaintiffs below, and M. Mark Mendel, Daniel E. Murray and M. Mark Mendel, Ltd., defendants below.[1]

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1. Marc I. Silver, the principal in Marshall-Silver, is the plaintiff in a related case captioned *Marc I. Silver v. M. Mark Mendel, individually, Daniel E. Murray, individually, and M. Mark Mendel, Ltd.*, Civil Action No. 86-7104 (E.D. Pa.) ("the *Silver* action"). A substantially identical RICO claim in the *Silver* action was dismissed, along with several state law claims. However, one state law claim remains and because, unlike this action, there is diversity jurisdiction in the *Silver* action, that case is still pending in the District Court. Plaintiffs in that action filed a motion under Rule 54(b), F.R.C.P., for leave to appeal the dismissed claims, but that motion was denied.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Marshall-Silver Construction Company, Inc. and Silver Construction, Inc. (collectively "Marshall-Silver"), respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on December 9, 1987, affirming the dismissal of the Complaint in this action for failure to state a claim upon which relief can be granted.

OPINIONS BELOW

The Complaint in this action was dismissed immediately following oral argument in a cryptic bench opinion by Judge Joseph L. McGlynn, Jr. A transcript of the bench opinion and a copy of the final order are included in the Appendix. *See* App. at A-1. The opinion of the Court of Appeals for the Third Circuit will be officially reported at 835 F.2d 63 (3d Cir. 1987). A copy of the slip opinion is included in the Appendix, beginning at

page A-4. A Petition for Rehearing was filed and denied by the Court of Appeals. *See* A-13.

STATEMENT OF JURISDICTION

On December 9, 1987, the Court of Appeals for the Third Circuit filed an opinion affirming the judgment of the District Court which dismissed the Complaint in this action in its entirety. On January 5, 1988, the Court of Appeals denied a Petition for Rehearing. This Court has jurisdiction to review this Petition for Writ of Certiorari under 28 U.S.C. §1254(1). In addition, the Petition has been filed within the requisite ninety (90) day period.

FEDERAL STATUTE INVOLVED

This Petition asks this Court to consider an Order dismissing a claim in a civil action alleging violations of §901(a) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The provision in dispute appears in 18 U.S.C. §1962(c) and it provides in full:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

This Petition also involves the definition of "pattern of racketeering activity" which appears in 18 U.S.C. §1961(5). That section states:

> "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

STATEMENT OF THE CASE

This action arises from defendants' six month campaign to put plaintiffs out of the construction business in retaliation for their failure to make a payment to an enterprise conducted by the individual defendants. Invoking federal question jurisdiction, 28 U.S.C. §1331, the Complaint alleges that Marshall-Silver is a construction company which was primarily engaged in building nursing homes in the Philadelphia area and in Florida (¶16).[2] Marshall-Silver acted as general contractor for owner/developers (¶18) and was paid on a cost-plus basis (¶19).

Barton Engineering Company ("Barton") was one of Marshall-Silver's subcontractors on four of its nursing home projects (¶21). During 1984, a series of disputes arose between Marshall-Silver and Barton (¶22). Mendel, who was a principal in Barton (¶¶11-12), met with, telephoned and corresponded with Marc I. Silver, Marshall-Silver's principal, on several occasions (¶23). On June 29, 1984 Mendel met with Silver in Silver's office and threatened to destroy Marshall-Silver, to destroy Silver's ability to earn a living, and to have Silver physically injured (¶24).

By letter under date of July 2, 1984 (Exhibit "A" to the Complaint, *see* App. at A-14), Mendel, purporting to speak as the Chairman of the Board of Barton Engineering Company, demanded payment of the disputed sums and threatened to file a Complaint with the United States Department of Housing and Urban Development ("HUD") for alleged manipulation of drawdown of funds from HUD; to apply to Judge Scirica (then a state court trial judge in Montgomery County, Pennsylvania and now a judge on the Court of Appeals for the Third Circuit) for a Temporary Restraining Order stopping all work on all of Marshall-Silver's construction projects; to request that the United States Attorney investigate how Silver acquired an equity interest in one of his projects; and to move for the

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2. Paragraph references are to the Complaint in this action.

appointment of a receiver for Marshall-Silver. Mendel's letter also promised to "tak[e] you for the long walk to the cleaners" and concluded:

> "We may not get paid in money, but *we will get paid in the visceral good feeling that we have taken you out of the market* and prevented you from further victimizing honest businessmen. If you think this letter was written in anger, it was not. It was written after careful deliberation and evaluation of what you people really appear to be doing. I told you you may have gotten away with pushing people around in the past, but you are now going to try me for size and that is something you may not be ready for." [Emphasis added].

In a second letter under date of July 3, 1984 (Exhibit "B" to the Complaint, *see* App. at A-20), Mendel repeated some of the threats from his July 2 letter and added a threat to report plaintiff to the Joint Building Trades Council concerning a non-union job that plaintiff supposedly was contemplating. Mendel further stated:

> "I assure you, and this is a threat, and don't kid yourself; your attorney may have told you I can't shut you down, but *I'll shut you up and I'll finish you off in the building business*. . . . You have one single option and one only. It is my office or suffer the wrath and take your licking, which I assure you you are going to get." [Emphasis added].

Mendel's purpose in threatening Marshall-Silver was to coerce it into making payments which he claimed were owed to Barton (¶30). Marshall-Silver refused to cave-in to Mendel's demands and insisted that Barton perform all of its obligations before payment was made (¶36).

Rather than carrying through on his threat to report Silver to the U.S. Attorney and to HUD and to obtain an injunction, Mendel settled upon a more insidious and sure-fire way to "finish [them] off in the building business." On December 28, 1984, Mendel caused Barton to file a Petition for Involuntary

Bankruptcy against Marshall-Silver in the United States Bankruptcy Court for the Eastern District of Pennsylvania (¶37). The Petition (Exhibit C to the Complaint, *see* App. at A-22) was signed by respondent Murray (¶38) who is, like respondent Mendel, associated with the respondent Mendel law firm.

Under the Bankruptcy laws, three creditors are required for an involuntary petition (¶40). In addition to Barton, the Petition was purportedly filed on behalf on Nester Brothers ("Nester") and R. J. Skelding Company ("Skelding") (¶41). As attested to by excerpts from the transcripts of a hearing in the Bankruptcy Court before the Honorable Emil P. Goldhaber (attached to the Complaint as Exhibits D-I), representatives of Skelding and Nester testified under oath that neither Mendel nor Murray nor Barton was authorized to include Skelding and Nester as petitioners seeking involuntary adjudication of bankruptcy against Marshall-Silver (¶47).

In connection with the filing of the Petition, the Bankruptcy Court ordered Barton to post a $750,000 bond and Skelding and Nester to post a $100,000 bond (¶42). None of the petitioning creditors posted the required bond, and the Bankruptcy Petition was dismissed in 1985 (¶43).

The filing of the Bankruptcy Petition was reported by Dunn & Bradstreet, the *Philadelphia Inquirer*, the *Philadelphia Business Journal* and the *Legal Intelligencer* (¶44) and was deliberately publicized by the respondents (*see* Third Circuit Slip Opinion, at A-6). As a result, the bankruptcy became widely known, and Marshall-Silver was unable to procure from any source the construction bonds that are necessary to conduct a construction business (¶46). Thus, even though the Bankruptcy Petition was dismissed, defendants succeeded in forcing Marshall-Silver out of the construction business in retaliation for its failure to knuckle under to the payment demands, and the company has suffered financial losses in excess of several million dollars (¶55).

The Complaint alleged that these actions by Mendel involved the federal predicate criminal acts of obstruction of justice and mail fraud and the state predicate criminal acts of conspiracy, attempted theft by extortion and making false and

misleading statements. The fraudulent activity in the bankruptcy court violated 18 U.S.C. §1961(1)(D).

Respondents attacked the RICO claims in the District Court on the ground that the Complaint failed to allege the requisite "pattern of racketeering" because it involved only a single scheme. In response to that argument, Petitioners offered to amend their Complaint, if necessary, to allege a second separate episode of racketeering by defendant Mendel. In their District Court brief[3] petitioners stated:

> "In the event that the court chooses to follow the more restrictive view of what constitutes a 'pattern of racketeering', plaintiffs are prepared to amend their Compaint to allege a second separate episode of racketeering." Petitioners' District Court Brief, at 29.

Specifically, Marshall-Silver proposed to amend the RICO claim to allege that Mendel and the Mendel law firm are engaged in separate acts of racketeering in connection with Mendel's involvement in the case of *Edgehill v. Municipal Publications, Inc., et al.* in the Common Pleas Court of Philadelphia, May Term, 1972, No. 2371 ("the *Edgehill* case"). The *Edgehill* case is a highly publicized defamation action against *Philadelphia Magazine* in which Mendel was trial counsel for plaintiff. The case was tried without a jury before former Judge Bernard Snyder who awarded $7,000,000 in compensatory and punitive damages to plaintiff. After that award was entered, information came to light that attorney Mendel and former Judge Snyder had engaged throughout the trial of the case in a pattern of shocking and highly improper conduct that resulted in Judge Snyder's removal from the bench by the Pennsylvania Supreme Court. *Judicial Inquiry and Review Board v. Snyder*, 523 A.2d 294 (Pa. 1987).

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3. Memorandum of Law on Behalf of Marc I. Silver, Marshall-Silver Construction Company, Inc. and Silver Construction, Inc. in Opposition to Defendants' Motion to Dismiss for Failure to State a Claim.

Although the public record to date has focused on the conduct of Judge Snyder, attorney Mendel was the protagonist in the scheme, and, if it is necessary to prove a wider scope of racketeering activity than has been alleged in the Complaint, petitioners were prepared to and have asked for permission to amend the Complaint to plead and prove the Snyder episode as evidence that Mendel's corruption of the judicial process in the Marshall-Silver case is not an isolated one and is part of a "pattern" by any standard.

Despite the fact that Marshall-Silver had pleaded numerous acts of racketeering activity continuing over a six-month period and despite the fact that Marshall-Silver sought leave to amend its complaint to show further criminal activity by Mendel, Judge McGlynn, from the bench, summarily dismissed the complaint and refused to allow amendment.

The Court of Appeals for the Third Circuit affirmed the District Court's order. The Third Circuit held that plaintiffs had not sufficiently pleaded the continuity required to constitute a pattern because there was only a single victim, a single injury, and a single-short-lived scheme with only two active perpetrators. In so holding, the Third Circuit virtually ignored Marshall Silver's request for leave to amend to show a second scheme with other victims and other injuries.

ARGUMENT

RICO is a criminal statute that was enacted not only to promote efforts to eradicate traditional organized crime but to reach legitimate enterprises that engage in "racketeering activity". RICO is unique among federal criminal statutes in that Congress has directed that it be "liberally construed to effectuate its remedial purposes." Section 904(a) of RICO, 84 Stat. 947; *see United States v. Turkette*, 452 U.S. 576, 587 (1981).

RICO also includes what this Court has described as a "far reaching civil enforcement scheme" in 18 U.S.C. §1964. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 483 (1985). As the Court observed in *Sedima*, "if Congress' liberal-construction

mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." 473 U.S. at 492 n.10.

When *Sedima* came before the Court in 1985, many of the lower federal courts, concerned about the proliferation of civil RICO claims in what were commonly called "garden variety business disputes" involving legitimate businesses, had restricted RICO by engrafting onto the statute such requirements as unique racketeering injury and proof of prior criminal convictions. Invoking Congress' "self-consciously expansive language and overall approach" and the liberal construction mandate, 473 U.S. at 498, the *Sedima* Court rejected "racketeering injury" and prior criminal convictions as required elements of a civil RICO claim.

Although the issue was not before the Court in *Sedima*, footnote 14 highlighted the "pattern of racketeering" requirement in the statute. "Pattern of racketeering activity", described in 18 U.S.C. §1961(5) as "requir[ing] at least two acts of racketeering activity", was construed as implying that "while two acts are necessary, they may not be sufficient." 473 U.S. at 496 n.14. The Court referred to four sources as possible aids in interpreting the "pattern of racketeering" requirement: a Senate report, a statement by Senator McClellan, a statement by Representative Poff and the analogous definition of "pattern of criminal conduct" that appears in a companion provision of that Act codified at 18 U.S.C. §3575(e).

The Senate Report referred to in footnote 14 emphasized that RICO did not target "sporadic activity", that the "threat of continuing activity" was necessary and that "continuity plus relationship" forms a pattern. 473 U.S. at 496 n.14, quoting S.Rep. No. 91-617, p. 158 (1969).

The Court also quoted Senator McClellan who described "pattern" as requiring "the showing of a relationship" and stating that "proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 473 U.S. at 496 n.14, quoting 116 Cong. Rec. 18940 (1970). Similarly, the Court quoted Representative Poff as saying that RICO was "not aimed at the isolated offender". 116 Cong. Rec. 35193.

Finally, footnote 14 makes reference to the definition of "pattern of criminal conduct" that appears in the dangerous special offender provisions of RICO which states that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events."

Not surprisingly, footnote 14 has become the focus of efforts in the lower federal courts to eliminate or severely confine civil RICO liability for "garden variety" business disputes.

In the slightly more than two and one-half years since *Sedima* was decided on July 1, 1985, 55 reported Courts of Appeal opinions and several hundred reported District Court Opinions have attempted to refine the concept of "pattern of racketeering" by reference to footnote 14. The result of two and one-half years of litigation is a patchwork of conflicting and often confusing decisions in an area of federal litigation that is a hotbed of activity. There are open conflicts among ten of the twelve circuits that have addressed the question; there are irreconcilable decisions within the same circuits, some acknowledged and some unacknowledged; there are conflicts with the statutory language; there are conflicts with *Sedima's* footnote 14, and there is an unseemly double standard between civil RICO decisions and criminal RICO decisions. In short, this is an issue that requires Supreme Court guidance.

A. The Conflicts Among the Courts of Appeals.

Ten courts of appeal[4] have addressed the pattern of racketeering issue in the wake of *Sedima's* footnote 14. Although generalizations are difficult, the Eighth Circuit has committed itself to the most restrictive view of the pattern requirement, holding that the statute requires not only multiple acts but multiple schemes or episodes. The Second, Fifth and Ninth Circuits have taken the least restrictive view and held that two

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4. Only the District of Columbia Court of Appeals and the Sixth Circuit appear not to have considered the issue in any substantive way since *Sedima* was decided.

or more racketeering acts, coupled with some evidence suggesting a threat of continuing activity, the involvement of multiple victims or other racketeering schemes suffices. The First, Third, Fourth, Seventh, Tenth and Eleventh Circuits have staked out positions in the middle ground that defy classification.

1. *The Restrictive View of Pattern.*

Eighth Circuit. The leading case representing the restrictive view of the pattern issue is *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1985). *Fulmer* reads *Sedima* as "suggest[ing] that [the Supreme Court] disagreed with [a] broad construction of 'pattern'." 785 F.2d at 256. Focusing only on the "continuity plus relationship" portion of *Sedima's* footnote 14, the Eighth Circuit held that one continuing scheme to convert gas from Superior Oil's pipeline did not meet the pattern test, even though the scheme was of several years duration, because there was no proof that the defendants had ever done the same thing in the past or that they had been engaged in other criminal activities elsewhere. 785 F.2d at 257.[5] Later decisions of the Eighth Circuit in civil cases have followed *Superior Oil*, although on several occasions judges have concurred and urged reconsideration of the multiple scheme requirement.[6]

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5. Ironically, *Superior Oil's* recognition that proof the defendants had engaged in similar activities or in other, presumably unrelated, criminal activities elsewhere would permit Marshall-Silver to amend its Complaint and litigate its claim that Mendel had engaged in a second scheme to corrupt the judicial process involving victims other than Marshall-Silver.

6. *See Madden v. Gluck*, 815 F.2d 1163 (8th Cir.), *cert. denied*, 108 S.Ct. 86 (1987) (multiple acts committed as part of scheme to keep corporation afloat so that principals could loot it is not a pattern because it constituted only one fraudulent scheme, applying *Superior Oil*); *United States v. Kragness*, 830 F.2d 842, 851 (8th Cir. 1987) (criminal case in which *Superior Oil* requirement met by proof of multiple drug importation schemes); *Holmberg v. Morrisette*, 800 F.2d 205, 209-210 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 1953 (1987) (multiple acts committed as part of single fraudulent scheme to draw down three letters of credit not a pattern); *Ornest v. Delaware North Companies, Inc.*, 818 F.2d 651 (8th Cir. 1987) (eight year scheme to defraud plaintiffs of commissions on sales of cigarettes from vending

In *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 107 S.Ct. 415 (1986) a criminal racketeering case involving a white Christian supremacy group that sought to overthrow the government, the Eighth Circuit rejected pattern of racketeering arguments without even mentioning *Superior Oil*. Ellison was charged with racketeering in connection with a single ongoing scheme to overthrow the United States Government, and the racketeering acts included arson directed at a church and at a community center. Rejecting the argument that the government had failed to prove a pattern of racketeering, the Eighth Circuit cited *Sedima's* footnote 14 and held that the government was required to prove only that the predicate acts "were related to the affairs of the enterprise, and that such activities were of an ongoing or continuous nature." 793 F.2d at 950.

2. *The Less Restrictive View of Pattern.*

Second Circuit. The leading case in the Second Circuit is *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987). In *Ianniello*, one defendant contended that his racketeering conviction should be reversed because the predicate mail fraud acts involving only two deceptive license renewal applications in successive years for the same establishment did not constitute a pattern of racketeering. The Second Circuit affirmed his conviction holding that.

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machines not a pattern because it was "nothing more than a single fraudulent scheme", following *Superior Oil*); *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326 (8th Cir. 1986) (six year scheme involving fraudulent security sales not a pattern following *Superior Oil*); *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 834 F.2d 148 (8th Cir. 1987) (following *Superior Oil*); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987) (requiring multiple schemes, following *Superior Oil*; two judges concurring and urging reconsideration of *Superior Oil*); *Henning v. First Bank of Worthington*, 831 F.2d 299 (8th Cir. 1987) (per curiam) (following *Superior Oil*, one judge concurring and urging reconsideration of *Superior Oil*).

> "When a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes §1962(c) to include are satisfied." 808 F.2d at 192.[7]

Three other Second Circuit decisions are to the same effect.[8]

Fourth Circuit. In *International Data Bank Ltd. v. Zepkin*, 812 F.2d 149, 154-155 (4th Cir. 1987), the Fourth Circuit adopted a rule that "the predicate acts must be related and, must be part of continuous criminal endeavors." The focus is on the "criminal dimension and degree". 812 F.2d at 155. Noting that defendants were accused of multiple racketeering acts as "part of a single, limited scheme to defraud", the Fourth Circuit affirmed dismissal of the Complaint.

The Fourth Circuit seized on the "continuity plus relationship" prong of footnote 14 to the exclusion of the other analytical

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7. Unlike any other decision outside the Second Circuit, *Ianniello* treats the continuity concept as being part of the enterprise issue rather than the pattern of racketeering issue.

8. *See United States v. Teitler*, 802 F.2d 606 (2d Cir. 1986) (criminal RICO case involving attorneys who committed multiple acts of mail fraud in the course of a single, ongoing scheme to defraud insurance companies in motor vehicle negligence cases; interpreting pattern requirement as requiring proof only that the challenged activity was not "sporadic"; held that pattern was adequately proven); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988) (following *Ianniello*, holding that "two related predicate acts will suffice to establish a pattern"); *United States v. Benevento*, ___ F.2d ___ (2d Cir. 1987) (following *Ianniello*) ("so long as the defendants commit at least two predicate acts, they have met the pattern requirement and, so long as the enterprise is long and elaborate enough to be considered continuing, the enterprise requirement is satisfied."); *Creative Bath Products, Inc. v. Connecticut General Life Insurance*, ___ F.2d ___ (2d Cir. 1987), 1988 Westlaw 3688 (following *Ianniello*, three fraudulent representations made by insurance agent in connection with short-lived scheme to sell four related life insurance policies does not satisfy *Ianniello's* continuing enterprise requirement); *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987) (single fraudulent insurance claim does not satisfy *Ianniello's* continuing enterprise requirement).

guideposts provided by the Court. More recent decisions of the Fourth Circuit have followed *Zepkin*.[9]

Fifth Circuit. The leading case in the Fifth Circuit is *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985). *R.A.G.S. Couture* involved the joint attempt of two perpetrators to defraud the company by the mailing of two false invoices. The Fifth Circuit characterized *Sedima* as imply[ing] that two "isolated" acts would not constitute a pattern". 774 F.2d at 1355. However, because the two fraudulent mailings were "related," the pattern of racketeering requirement was considered satisfied. Two later Fifth Circuit decisions have followed *R.A.G.S. Couture* but urged its en banc reversal. *See Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) (suggesting that two discrete criminal events are required to establish a pattern and that separate racketeering acts committed "preparatory to the accomplishment of a discrete offense" should not suffice); *Crocker v. Federal Deposit Insurance Corp.*, 826 F.2d 347, 348 n.2 (5th Cir. 1987), *petition cert. filed*, 56 U.S.L.W. 3425 (December 1, 1987) (questioning in *dicta* whether two or more instances of mail or wire fraud in connection with the same "discrete offense" establishes a pattern.)[10]

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9. *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073-74 (4th Cir. 1987) (ongoing dispute between developers involving adjoining tracts of land does not constitute a pattern); *Eastern Publishing and Advertising Inc. v. Chesapeake Publishing and Advertising Inc.*, ___ F.2d ___ (4th Cir. 1987) (single, limited unfair competition scheme involving multiple predicate acts does not constitute a pattern, following *Zepkin*); *El-Hoss Engineering and Transport Co. v. Akhavan* (4th Cir. 1987) (unpublished opinion available on Westlaw) (alleged racketeering acts arising out of single shipment of goods is not a pattern, invoking *Zepkin* single limited scheme rule).

10. Two other Fifth Circuit decisions have discussed the issue without citing *R.A.G.S. Couture*. *See Cowan v. Corley*, 814 F.2d 223, 326-27 (5th Cir. 1987) (holding that Complaint that alleged two distinct criminal acts establishes a pattern); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-81 n.7 (5th Cir. 1986) (questioning in *dicta* whether allegation of multiple acts of wire fraud suffices to establish a pattern).

Ninth Circuit. The leading case in the Ninth Circuit is *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987). Dierdorff was the president and chief executive officer of Sun Savings & Loan. Sun alleged that Dierdorff received kickbacks from Sun's customers in exchange for his approval of large loans. The four predicate acts of mail fraud were four letters written by Dierdorff to government agencies and to the Savings & Loan's auditors allegedly in an effort to cover up the kickbacks. The Ninth Circuit reviewed *Sedima*'s footnote 14 and various cases interpreting footnote 14 and held that the four letters were sufficient to establish a pattern. In its analysis, the Ninth Circuit emphasized that footnote 14 did not "enshrine 'continuity plus relationship' as a determinative two-pronged test." 825 F.2d at 192. Instead, unlike most courts that have considered the question, the Ninth Circuit focused on the language in 18 U.S.C. §3575(e) defining pattern of criminal conduct. In its view:

> "RICO requires repeated *acts* not repeated *activity*. Thus, if a defendant commits two or more predicate acts that are not isolated events, are separate in time, and are in furtherance of a single criminal scheme, then RICO's pattern requirement is satisfied. . . . The continuity requirement set forth in *Sedima* is aimed only at eliminating RICO actions against perpetrators of isolated or sporadic acts and is not an attempt to limit RICO to complicated systems or multiple schemes of criminal activity. . . . [W]e prefer simply to examine the predicate acts to see whether they are in fact isolated or sporadic. If the acts are not isolated or sporadic, then the racketeering activity is continuous. . . . [T]he test for establishing whether the acts are isolated is whether the acts posed a threat of continuing activity." 825 F.2d at 193-194 [Emphasis in original].[11]

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11. *See also California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988) (multiple fraudulent sales spanning five month period constitutes a pattern, noting split in the circuits); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393

3. *The Intermediate View of Pattern.*

Seventh Circuit. The leading case in the Seventh Circuit, at least until recently, has been *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986). In *Morgan* the Seventh Circuit read *Sedima*'s footnote 14 as suggesting that the courts "have overlooked the pattern requirement as a way to limit the scope of RICO while remaining consistent with the language of the statute." The Court noted the emerging conflict among the circuit courts on the meaning of *Sedima*'s footnote 14 and noted that the "relationship and continuity" notion was a difficult one to apply because concepts "are somewhat at odds with one another." 804 F.2d at 975.

Cautioning against excessive reliance on either concept, the *Morgan* Court chose a "middle course", 804 F.2d at 975, adopting a "factually-oriented standard, not a set rule", 804 F.2d at 974. According to the Seventh Circuit:

> "In order to be sufficiently continuous to constitute a pattern of racketeering activity, the predicate acts must be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., 'transactions somewhat separated in time and place.'

(9th Cir. 1986), (multiple predicate acts committed in connection with fraudulently obtaining a single shipment of goods not a pattern, holding that the threat of continuing activity was absent); *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 918 (9th Cir. 1987) (thirteen fraudulent acts committed by employee in defrauding employer satisfies pattern of racketeering requirement); *Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360 (9th Cir. 1987) (describing tests as requiring two or more related acts and the threat of continuing activity; describing the pattern issue as "poorly mapped terrain"); *United Energy Owners Committee Inc. v. United States Energy Management Systems, Inc.*, __ F.2d __ 1988 Westlaw 327 (9th Cir. 1988) (applying *Sun Savings* analysis and describing pattern tests as requiring predicate acts that are not "isolated or sporadic" and whether the acts "posed a threat of continuing activity"); *Jarvis v. Regan*, 833 F.2d 149 (9th Cir. 1987) (finding no pattern where predicate acts were isolated and presented no threat of continuing).

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11. *See also California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988) (multiple fraudulent sales spanning five month period constitutes a pattern, noting split in the circuits); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393

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> Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. However, the mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement." 804 F.2d at 975-76 [citations omitted].

Applying those standards, the Seventh Circuit held that allegations of false representations made in connection with an investment spanning four years satisfied the pattern requirement.[12]

The Seventh Circuit's two most recent decisions on the pattern of racketeering question seem to signal a significant change in the direction of the less restrictive view. *Appley v. West*, 832 F.2d 1021 (7th Cir. 1987), involved a suit by a trust beneficiary against a trustee who embezzled substantial sums of money from a trust. There were two beneficiaries to the trust, plaintiff and her mother, and the racketeering acts were the filing of two fraudulent tax returns. Even though there was a single perpetrator, a single trust and a single, discrete embezzlement

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12. *See also Lipin Enterprises Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) (fraudulent representations designed to defraud a single victim in the sale of a business do not constitute a pattern; describing pattern requirement as requiring "threat of continuing activity" by defendants through proof of similar fraud schemes or proof that defendant is a person who regularly commits such crimes); *Elliott v. Chicago Motor Club Insurance*, 809 F.2d 347 (7th Cir. 1986) (alleged racketeering acts committed in connection with insurance company's denial of claims arising out of a single accident is not a pattern of racketeering); *Marshall & Ilsley Trust Co. v. Landis*, 819 F.2d 806 (7th Cir. 1987) (applying *Morgan*); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th Cir. 1987) (finding no pattern where activity was sporadic and isolated); *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477 (7th Cir. 1986) (fraudulent efforts to induce plaintiff to settle workers compensation claim are an "isolated episode of fraud" that does not constitute a pattern).

scheme, the Seventh Circuit had little difficulty in distinguishing *Appley* from its earlier decisions and found the requisite pattern of racketeering.

Similarly, in *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), defendants were accused of falsifying a series of shipping orders to cover their failure to return empty gas cylinders to plaintiff. The claim involved a single diversion scheme involving a single plaintiff, closely related perpetrators and a seven month time period. Nonetheless, the Seventh Circuit held that "the repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity. . . ."

First Circuit. In *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987), the First Circuit held that to prove a pattern "[t]he constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence." 814 F.2d at 30. Applying that standard, the Court held that a single bribe paid in three installments did not establish a pattern in the absence of evidence that defendants had engaged in other acts of bribery.[13]

Third Circuit. The Third Circuit's position on the pattern of racketeering issue has evolved slowly. *Malley-Duff & Associates v. Crown Life Insurance Co.*, 792 F.2d 341, 353 n.20 (3d Cir. 1986), *aff'd on other grounds*, 107 S.Ct. 2759 (1987), was the Third Circuit's first post-*Sedima* attempt to deal with the pattern issue. The Court observed that *Sedima* "did not . . . give much guidance". 792 F.2d at 353 n.20. Moreover, the Court held, without analysis, that an alleged scheme by one life insurance company to freeze out certain of its agencies met even the most restrictive pattern requirements of the Eighth Circuit in *Superior Oil*. In *United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986), *cert. denied sub nom Robinson v. United States*, 107 S.Ct (1987), the Third Circuit affirmed racketeering convictions

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13. *See also Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291, 298 (1st Cir. 1986) (describing pattern issue in *dicta* as one that "has yet to be clearly established in the law", citing footnote 14 of *Sedima*).

of a motorcycle gang that was involved in drug dealing. There, relying on the analagous definition of pattern of criminal conduct defined in 18 U.S.C. §3575(e), the Court held that the pattern requirement was satisfied because these were not "isolated events". 795 F.2d at 290.

In recent months, the Third Circuit has held in rapid succession that:

> —A service company that overbilled multiple customers over an eleven month period satisfied the pattern requirement. *Petro-Tech v. Western Company of North America*, 824 F.2d 1349 (3d Cir. 1987)
>
> —The acts of political officials in Kearny, New Jersey in extorting two bribes from two developers established a pattern. *Town of Kearney v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263 (3d Cir. 1987).
>
> —A bank's alleged participation as a lender in the marketing of oil and gas limited partnerships to investors met the pattern requirement. *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3d Cir. 1987).
>
> —Respondents' six month campaign of threats and harassment directed to Marshall-Silver culminating in the filing of a fraudulent bankruptcy petition is not a pattern; moreover, Marshall-Silver could not satisfy the pattern requirement even if it was permitted to amend the Complaint to allege a second separate scheme in which respondent Mendel had previously committed predicate racketeering acts in connection with a case pending in the state court system. *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63 (3d Cir. 1987).

Tenth Circuit. The leading case in the Tenth Circuit is *Torwest DBC Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987). In *Torwest* the Court noted that the courts have struggled to implement *Sedima's* directive to develop a meaningful concept of pattern, based in part on the "abstract nature of the court's references to continuity and relationship." 810 F.2d at 928. Analyzing the completed fraudulent scheme before them, the

Court concluded, however, that the continuity aspect was absent because there was no threat of ongoing illegal conduct.[14]

Eleventh Circuit. The leading case in the Eleventh Circuit is *Bank of America National Trust and Savings Ass'n v. Touche-Ross & Co.*, 782 F.2d 966 (11th Cir. 1986). In *Touche-Ross*, the Eleventh Circuit relied on the definition of pattern of criminal conduct set forth in 18 U.S.C. §3575(e). 782 F.2d at 971. The Court held that a complaint against a big eight accounting firm for allegedly fraudulent auditing work spanning three years met the pattern requirement.[15]

B. Supreme Court Review Is Necessary to Refine and Refocus Analysis of the Pattern of Racketeering Issue.

Under the current confusing fabric of decisions, the analytical framework governing the pattern issue is flawed. *First*, the courts have exclusively focused on this Court's *dictum* in footnote 14 of *Sedima* to the exclusion of *United States v. Turkette*, 452 U.S. 576 (1981). In *Turkette*, in making the distinction between the "enterprise" and a pattern of racketeering activity", this Court said:

> The pattern of racketeering activity is . . . a series of criminal acts defined by the statute . . . . The [pattern] is proved by evidence of the requisite number of acts of

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14. *See also Condict v. Condict*, 826 F.2d 923, 928-29 (10th Cir. 1987) (holding that an ongoing family business dispute involving alleged fraudulent acts in connection with control of the family business did not meet the continuity requirement, following *Torwest*); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212 (10th Cir. 1987) (following *Torwest*).

15. *See also United States v. Fernandez*, 797 F.2d 943, 951 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 3230 (1987) (kidnap and murder of same victim in connection with drug smuggling ring met pattern requirement because they were "closely related to each other and to the ongoing objective of narcotics smuggling"); *United States v. Hobson*, 825 F.2d 364, 366 n.2 (11th Cir. 1987), *petition cert. filed* December 22, 1987 (holding that *Sedima* did not change the Eleventh Circuit "rule" that two separate crimes sufficed to establish pattern).

racketeering committed by the participants in the enterprise." 452 U.S. at 583.

The quoted language from *Turkette* is part of the holding and rationale of the case and is not *dictum*. There is no mention of "continuity". Rather, pattern is described as a series of criminal acts.

Second, although the lower federal courts certainly were obliged to pay heed to the suggestions stated in footnote 14 of *Sedima*, the starting place for analysis of the statutory language should be, as it always is, the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). "If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary', the language must ordinarily be regarded as conclusive." *Russello v. United States*, 464 U.S. 16, 20 (1983). RICO defines "pattern of racketeering activity" as requiring "at least two acts of racketeering activity". To the extent that the requisite multiple acts of racketeering must form a 'pattern' it is helpful to consider the common meaning attached to the word 'pattern'. *Webster's Seventh New Collegiate Dictionary* defines "pattern" as "a reliable sample of traits, acts, or other observable features characterizing an individual". That common sense, lay understanding of "pattern" is a far cry from some of the interpretations that have emanated from the courts of appeal in recent years.

Third, footnote 14 of *Sedima* suggested four possible grounds for analyzing the pattern requirement: a Senate Report, the statements of Senator McClellan and Representatives Poff, and analogous pattern language contained in the same act codified at 18 U.S.C. §3575(e). For reasons that are not entirely clear, a majority of the courts interpreting footnote 14 have seized upon the "continuity plus relationship" language quoted from the Senate Report to the exclusion of the three other sources. The notion of "continuity plus relationship" is far more amorphous than other concepts that the Court alludes to in footnote 14. The other sources suggest that "pattern" means nothing more than acts that are neither "sporadic" nor "isolated" and possibly "the threat of continuing activity". If emphasis had

been placed on these concepts rather than "continuity plus relationship" different results would have been reached in many cases, including this case.

Fourth, as several courts have observed, there is a tension between the concepts of "relationship" and "continuity". *E.g.*, *Petro-tech Inc. v. Western Co. of North America*, 824 F.2d 1349, 1355 (3d Cir. 1987); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). To prove the relationship of racketeering acts one must show their temporal proximity and the close relationship of the victims. To show continuity, on the other hand, one must prove the separateness of the acts and the different victims. As the *Morgan* Court noted, "[t]o focus excessively on either continuity or relationship alone effectively negates the remaining prong." 804 F.2d at 975. In petitioner's view, to accomplish the objective of the statute, "pattern" should be construed to focus principally on the propensity of the defendant to commit racketeering acts.

Fifth, the courts interpreting the pattern requirement in the wake of *Sedima* have almost uniformly lost sight of the statutory language, emphasized in *Sedima* itself, requiring that the Act "be liberally construed to effecuate its remedial purposes." Section 904(a) of RICO, 84 Stat. 947. Application of the congressionally mandated rule of construction and recognition that the Act is not intended to be limited to typical cases of organized crime, compels adoption of a far more generous "pattern of racketeering" approach than has been adopted by a majority of the lower federal courts.

Sixth, the growing emphasis on the existence of mutiple victims and multiple perpetrators ignores the fact that RICO clearly contemplates civil actions by individual victims against individual perpetrators. The statute authorizes actions by "[a]ny person injured in his business or property by reason of violation of section 1962 of this chapter. . . ." Further, 18 U.S.C. §1962(c) makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." "Person" is defined as including "any individual or entity. . . . ." 18 U.S.C. §1961(b). Thus,

courts, including the Third Circuit in this action, are mistaken in attaching importance to the fact that a criminal scheme had only a single victim or a single perpetrator. Properly construed, "pattern" refers to the propensity of a defendant to engage in racketeering activities, not to a head count of victims and victimizers.

Finally, there is an unseemly disparity between the pattern requirement as defined in civil RICO decisions and the pattern requirement developed in criminal RICO decisions. Ironically, the lower federal courts seem much more inclined to liberally construe the pattern requirement in criminal cases where the defendants typically have been convicted of actions that any fair minded person would agree are downright evil. Civil cases typically involve commercial disputes in varying shades of gray, and courts have taken a much harder line. *Compare, e.g., Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), *with United States v. Ellison*, 793 F.2d 942 (8th Cir. 1986).

CONCLUSION

In *Sedima*, this Court rejected two arguments that had been devised by litigants to limit the applicability of RICO to "garden variety" commercial disputes. In so doing it included footnote 14, suggesting in *dicta* that the mere existence of two or more racketeering acts did not, without more, meet the requirement of a pattern of racketeering. The Court suggested several possible lines of analysis. For some reason, the lower federal courts have singled out quoted language from the Senate Report suggesting that proof of "continuity plus relationship" was required to prove a "pattern". This has resulted in a cramped interpretation of the Act.

"Pattern" refers to nothing more than a defendants' propensity for racketeering activity, and proof that the challenged conduct was not "isolated" or "sporadic" should suffice. In any event, in the two and one-half years since *Sedima* was decided the courts of appeal have turned the "pattern" issue into a morass. In this case, which was anything but a "garden variety" commercial dispute, the doors to the federal courts were

slammed shut on a deserving litigant under the "continuity plus relationship" banner. For these reasons, Marshall-Silver respectfully requests that the Court grant its Petition for Certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION [SIC] OF PENNSYLVANIA

MARSHALL-SILVER CONSTRUCTION CO., INC., SILVER CONSTRUCTION INC. and MARK I. SILVER	:	CIVIL ACTION
vs.	:	
M. MARK MENDEL, DANIEL E. MURRAY and M. MARK MENDEL, LTD.	:	NUMBERS: 86-7103 and 86-7104

PHILADELPHIA, PENNSYLVANIA

MARCH 19, 1987

BEFORE: HON. JOSEPH L. McGLYNN, JR., J.

ORAL ARGUMENT RE: DEFENDANTS' MOTION TO DISMISS

BENCH OPINION

REPORTED BY: PAUL J. McGOWAN
Official Court Reporter
2722 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Proceedings recorded by mechanical stenography, transcript produced from dictation.

APPEARANCES:

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FOR THE DEFENDANTS

THE COURT: All right. My ruling is this.

I am going to dismiss the RICO claim in both lawsuits.

With respect to Civil Action Number 86-7103, in which that's the only basis for federal jurisdiction, I will decline to exercise — well, I don't think I have the right to exercise jurisdiction, since there is no independent ground for jurisdiction. So, I will dismiss the remaining claims in 86-7103. Of course, that will be without prejudice to bring those causes of action in the proper forum.

Also, as I stated earlier, I will dismiss the RICO claim under 7104, in Civil Action 86-7104. I'll also dismiss all other tort claims except the claim under the Dragonetti statute, and, with respect to that, the Motion to Dismiss will be denied.

So, as I see it, the one cause of action remaining is under the Dragonetti case, which is where this case should be anyhow. That's the thrust of his complaint, that there was an abuse of the processes of the Court, which caused him great injury and harm. I think the case ought to be tried on that basis.

MR. SANDEL: Thank you, Your Honor.

THE COURT: All right.

IN THE
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v.	:	
M. MARK MENDEL, Individually, DANIEL E. MURRAY, Individually, and M. MARK MENDEL, LTD.	:	NO. 86-7103
MARK I. SILVER	:	CIVIL ACTION
v.	:	
M. MARK MENDEL, Individually, DANIEL E. MURRAY, Individually, and M. MARK MENDEL, LTD.	:	NO. 86-7104

ORDER

AND NOW, this 19th day of MARCH, 1987, upon consideration of the defendants' motions to dismiss and the plaintiffs' response thereto and after a hearing, it is

ORDERED

1. The motion is GRANTED as to the RICO claims in both cases.

2. All remaining claims in Civil Action 86-7103 are dismissed without prejudice because there is no independent basis for the exercise of this court's jurisdiction.

3. With the exception of the claim based on 42 Pa. C.S.A. § 8351, all state law claims in Civil Action 86-7104 are dismissed.

4. The motion is DENIED as to the claim grounded on the wrongful use of civil proceedings. 42 Pa. C.S.A. § 8351.

BY THE COURT

JOSEPH L. McGLYNN, JR.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1187

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.
and
SILVER CONSTRUCTION INC.,

Appellants

vs.

MENDEL, M. MARK, Individually
MURRAY, DANIEL E., Individually
M. MARK MENDEL, LTD.

On Appeal From the United States District
Court For the Eastern District
of Pennsylvania
(Civil Action No. 86-7103)

Argued October 8, 1987

BEFORE: WEIS and STAPLETON,
Circuit Judges, and
DIAMOND, *District Judge**

(Opinion Filed December 9, 1987)

Richard M. Jordan, (Argued)
David E. Sandel, Jr.
White and Williams
17th Floor
1234 Market Street
Philadelphia, PA 19106

Attorneys for Appellant

*Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

H. Robert Fiebach (Argued)
David I. Bookspan
Wolf, Block, Schorr and Solis-Cohen
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102

Attorneys for Appellees

OPINION OF THE COURT

STAPLETON, *Circuit Judge*.

In this appeal, we once again confront the question of what constitutes a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. §§ 1961-1968 (1982 & 1986 Supp.) (RICO). Because we conclude that the allegations of racketeering activity in this case, even if proven to be true, would be insufficient to support a finding that a pattern existed, we will affirm the order of the district court dismissing the complaint.

I.

Plaintiff Marshall-Silver Construction Co., Inc. (Marshall-Silver)[1] is a general contractor that was engaged primarily in building nursing homes. Defendants M. Mark Mendel and Daniel Murray are shareholders and officers of Barton Engineering Co. (Barton), which is not a defendant here. Mendel and Murray are also attorneys; they are members of the law firm

1. This designation of plaintiff was used throughout the district court proceedings. It includes both Marshall-Silver Construction Company and an affiliated corporation, Silver Construction Company. Defendants have attempted to make an issue out of the proper identity of the plaintiff, based on the facts that Silver Construction was only recently formed, that Marshall-Silver's name was changed to Silver Construction and then back to Marshall-Silver again, and that no harm to Silver Construction has been alleged. For purposes of this review, however, we accept the statement of Marshall-Silver's attorney that it can be shown that Marshall-Silver Construction Company, Inc. has been doing business as such all along. App. at 225.

M. Mark Mendel, Ltd. (the Mendel firm), which is a defendant here. Mendel and the Mendel firm serve as Barton's attorneys.

Barton subcontracted business from Marshall-Silver during the first half of 1984. According to Marshall-Silver, Barton did not perform on its contracts on time or with acceptable work quality, and Marshall-Silver withheld payment as a result. Mendel had a stormy interview at Marshall-Silver on June 29, 1986 on the subject of the withheld payments; Mendel then wrote two strongly-worded letters, dated July 2, 1986 and July 3, 1986, in which he threatened to destroy Marshall-Silver unless it paid Barton for the latter's work. Despite these threats and the continued lack of payment to Barton, Mendel apparently took no further action for about six months.

On December 28, 1984, Barton filed a petition in the U.S. Bankruptcy Court for the Eastern District of Pennsylvania, requesting that Marshall-Silver be put into involuntary bankruptcy. Marshall-Silver alleges that the allegations of the petition were false and that defendants knew them to be false. The press, including Dunn & Bradstreet and the Philadelphia Inquirer, thereupon reported that Marshall-Silver was bankrupt. Marshall-Silver alleges that defendants contacted the press themselves to be sure that news of the bankruptcy was widely publicized. After the reports of bankruptcy, Marshall-Silver was unable to obtain the construction bonds it needed to conduct its business. As a result, it could neither complete certain ongoing projects nor submit bids on new ones. In this way, Marshall-Silver was allegedly put out of business by defendants.

The bankruptcy petition was filed in the names of Barton and two other subcontractors of Marshall-Silver's, Nester Brothers (Nester) and R.J. Skelding Co. (Skelding). Allegedly, neither Nester nor Skelding authorized Barton to include them in the petition.

After the requisite notice and hearing, the bankruptcy court ordered that Barton, Nester, and Skelding post bonds totalling $850,000, Barton's share of this total being $750,000. None of the three posted a bond. As a result, the petition for involuntary bankruptcy was dismissed on February 8, 1985.

Marshall-Silver subsequently filed this suit charging defendants with violations of RICO and of various state laws. Defendants moved to dismiss under Fed.R.Civ.P. 12(b)(6) and the district court, without explanation, granted the motion as to all claims. Plaintiff appeals from that dismissal.

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982), and our review is plenary. We must accept as true all well-pleaded allegations of the complaint, and construe them in the light most favorable to the plaintiff; the dismissal may stand only if no set of facts in support of the claim could be proved which would entitle the plaintiff to relief. *Labov v. Lalley*, 809 F.2d 220, 221-22 (3rd Cir. 1987).

The allegations necessary to support a RICO claim under 18 U.S.C. § 1962, as set forth in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985), are (1) the conducting of, (2) an enterprise, (3) through a pattern, (4) of racketeering activity. In addition, *Sedima* establishes that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Id.* Defendants argue that Marshall-Silver has failed to properly allege an enterprise, racketeering activity, and a pattern. We find it necessary to address only defendant's argument regarding the absence of a pattern.

Under 18 U.S.C. § 1961(5), two predicate racketeering acts may be sufficient to constitute a pattern of racketeering activity. Specific predicate acts are listed in § 1961(1), and include any act which is indictable under the statutes prohibiting obstruction of justice (18 U.S.C. § 1503),[2] mail fraud (18 U.S.C. § 1341),[3] as

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2. 18 U.S.C. § 1503 reads, in part:

Whoever corruptly . . . endeavors to influence, intimidate, or impede any . . . officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined . . . or imprisoned . . . or both.

3. 18 U.S.C. § 1341 reads, in part:

Whoever, having devised or intending to devise any scheme or artifice to

well as "any offense involving fraud connected with a case under title 11," the title pertaining to bankruptcy, 18 U.S.C. § 1961(1)(B)(D).

Marshall-Silver contends that defendants conducted the affairs of Barton through a pattern of racketeering activity consisting of the following predicate acts: knowingly and falsely including Nester and Skelding as creditors on the bankruptcy petition, causing a fraudulent bankruptcy petition to be filed, giving false testimony under oath at the bankruptcy hearing, falsely publicizing that Marshall-Silver was bankrupt, and using the mails to transmit threatening letters and to further the false bankruptcy scheme.

Marshall-Silver further contends that the defendants, in the course of their efforts to drive it out of business through the institution of the fraudulent bankruptcy proceeding, violated Pennsylvania statutes that proscribe conspiracy and attempted theft by extortion (18 Pa. Cons. Stat. Ann. § 3923(a)(7)), threatening to inflict harm (18 Pa. Cons. Stat. Ann. §§ 901, 903), and making false and misleading statements (18 Pa. Cons. Stat. Ann. § 4107).

The latest guidance from the Supreme Court regarding the concept of a pattern of racketeering activity is found in the now famous footnote from the *Sedima* case, 473 U.S. at 496, n.14. The Court there cautioned that "while two acts are necessary, they may not be sufficient." It went on to conclude that a pattern requires "continuity plus relationship":

> The legislative history supports the view that two isolated acts of racketeering do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business

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NOTES (*Continued*)

defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined . . . or imprisoned . . . or both.

> normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added).

This guidance has not resulted in uniform treatment of the pattern issue in the lower courts. The Court of Appeals for the Eighth Circuit has taken the strict view that no pattern can exist absent multiple fraudulent schemes or criminal episodes. *See Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) ("It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as 'a pattern of racketeering activity' "). Other federal courts of appeal have generally been less strict. *See, e.g., International Data Bank Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (single limited scheme does not constitute a pattern but single large continuous scheme might); *California Architectural Bld. Prods. Inc. v. Franciscan Ceramics Inc.*, 818 F.2d 1466, 1469 (9th Cir. 1987) (single scheme with multiple fraudulent sales to multiple victims may constitute RICO pattern); *Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (nine predicate acts all part of a single scheme satisfy the pattern requirement after *Sedima*).

This court has dealt with the pattern issue on a number of occasions. In most of our decisions, we have found no need to define "pattern" specifically since the existence of one was clear under any definition of that term. *See Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, No. 87-5044 (slip op.) (3d Cir. Sept. 25, 1987); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1351 (3d Cir. 1987); *United States v. Grayson*, 795 F.2d 278, 288-90 (3d Cir. 1986), *cert. denied sub nom. Robinson v. United States*, 55 U.S.L.W. 3493 (1987); *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 792 F.2d 341 (3d Cir. 1986), *aff'd on other grounds sub nom. Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 55 U.S.L.W. 4952, 4954 (1987). Recently, however, we were called upon to review a RICO case in which the "complaint . . .

arguably depict[ed] an unlawful venture more modest than those involved in our earlier cases." *Barticheck v. Fidelity Union Bank*, No. 86-5870 (slip op. at 7) (3d Cir. Oct. 29, 1987). We there confronted and rejected the Eighth Circuit's position that a RICO pattern must involve at least two distinct unlawful schemes. We also rejected "the view that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern ony if the scheme is potentially ongoing or open-ended." *Id.* at 9. In the course of rejecting this view, we explained our understanding of the concept of "continuity":

> We do not believe, however, that the notion of continuity compels a requirement of "open-endedness." At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such a case the scheme would presumably be considered open-ended. This same interpretation, though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO.
>
> We read the legislative history's reference to "continuity" as simply calling for an inquiry into the extent of the racketeering activity. Although temporal open-endedness may be one measure of extent, it is not the only one. We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be "continuous." This determination necessarily depends on the circumstances of the particular case.

Factors relevant to the case-by-case analysis to which we referred in *Barticheck* include, but are not limited to, "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the

unlawful activity." *Barticheck*, slip op. at 7; *see also Petro-Tech* at 1355.

Applying this analysis to the case at bar, we find the allegations insufficient to meet the statutory requirement of a pattern. The target of the RICO statute, as its name suggests, is criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time. Here we have a single victim, a single injury, and a single, short-lived scheme with only two active perpetrators.[4] This is not criminal activity with the kind of continuity of which we spoke in *Barticheck*.

The Court of Appeals for the Seventh Circuit has recently reached the same conclusion in two cases presenting factual situations quite similar to the one before us. In *Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th Cir. 1987), the court observed:

> The multiple predicate acts by Pannell/Jaeger covered a short period of time (several months) and do not take on the character of being separate and distinct schemes in time and place. The acts alleged related to a single scheme to defraud a single victim in what appears to be a "one-shot" effort to inflict a single injury. Such a factual scenario simply fails to satisfy the continuity aspect of racketeering activity required by *Sedima*.

811 F.2d at 1112. Similarly, in *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322 (7th Cir. 1986), there was only a single instance of fraud with only a single victim; the court concluded that "[w]hatever more is required to allege a pattern of racketeering activity, that something more is lacking here." 803 F.2d at 324.

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4. It is Mendel and Murray who are alleged to have conducted the affairs of Barton in such a way as to bring about the predicate acts. While the Mendel firm is also a defendant, it is alleged to have participated in the affairs of Barton only through the activities of these two individuals.

Because the complaint does not allege a pattern of racketeering activity, the RICO claim was properly dismissed.[5] Absent the RICO claim, the sole federal claim, the district judge did not abuse his discretion in declining to exercise pendent jurisdiction over the state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

For the foregoing reasons, we will affirm the judgment of the district court dismissing plaintiff's claims.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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5. We reject plaintiff's claim that it should have been allowed to amend its complaint to include allegations of totally unrelated activities, namely Mendel's involvement in a case that is said to have been improperly handled by a Common Pleas Court judge. Allegations of predicate acts done in connection with that matter would fail, in the context of this suit, to meet either the requirement of relationship or that of continuity.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1187

MARSHALL-SILVER CONSTRUCTION COMPANY, INC. and SILVER CONSTRUCTION INC.,

Appellants

vs.

MENDEL, M. MARK, Individually
MURRAY, DANIEL E., Individually
M. MARK MENDEL, LTD.

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*, and DIAMOND, *District Judge**

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: Jan. 5, 1988

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*Honorable Gustave Diamond, United States District Judge for the Western District of Pennsylvania, sitting by designation.

M. Mark Mendel, Ltd.
Attorneys at Law
1620 Locust Street
Philadelphia, PA 19103-8392
(215) 732-7200

July 2, 1984

Mr. Mark I. Silver, President
Marshall-Silver Construction Company, Inc.
50 Monument Road — Suite 305
Bala Cynwyd, PA 19004

Re: Various Topics Discussed at the Meeting of Friday, June 29, 1984 in your Offices, 12:00 noon to 1:18 p.m.

Dear Mr. Silver:

In order for the childish and cunning nonsense of your failure to deal with our company in a fair and businesslike manner to cease, I have injected myself as Chairman of the Board of the Company, by being courteous enough after standing by for months and watching manipulations and shysterlike tactics of the worst kind take place, to come to your premises and meet with you personally. I found it unfortunate that you need Herbert Victor, your assistant at that meeting to echo and lend credibility to your false misrepresentations.

Now that I have got the characterization of the method and manner in which you have been operating out of the way, since I gave you the courtesy of coming there in the hope of alleviating that kind of chicanery in the future, let me now meet head-on some of your objections and complaints which justify the extraordinary nonpayment of your obligations to this company, in your mind, but *not in ours*.

No. 1. The boiler room fan for the project at Manahawkin has been ordered and is in our possession ready to be installed, and we did not need a reminder from you nor did we need

moneys held out when there is 10% retainage on the job against such occurrences. That 10% happens to reflect a figure of $25,000.00.

No. 2. Your allegations that you were justified in withholding funds by virtue of wrong diffusers being placed into the ceiling is categorically false. The diffusers that were placed in are superior to the ones on the plans and rated higher than the ones originally ordered and in discussing it with Bob Barton, I learned that the only thing that needed to be accomplished was a change order with the projects engineer. But there was some question in the past whether the project engineer was Mr. Joseph Mercandonti or Jon Edward Fox and which one was the appropriate individual to get the change order from, and that was subject to your confirmation, which, unfortunately, neither you nor your echo, Mr. Victor, has seen fit to respond to. If, in fact, it is Mercandonti or Fox, Mr. Brusco will without further delay acquire the change order, eliminating that alleged justifiable reason for nonpayment.

No. 3. There indeed is a damaged HVAC cover, damaged due to no negligence of this company, but by the shipper. The new HVAC front cover is in our shop and is on our punch list and we are prepared to make that repair, just as we are any other justifiable repair, subject, of course, to *fiscal resolution*, as a condition precedent.

No. 4. I have ascertained that you are correct that there are some ceiling tiles for which we are responsible. They are limited to tiles in one room where they were damaged due to a slight A.C. leak, and we will replace them without further delay. They are on our punch list, subject to *fiscal resolution* as a condition precedent.

No. 5. The air balance on all of the HVAC units are on our punch list. They indeed can and will be balanced subject to *fiscal resolution*, as a condition precedent.

No. 6. Your accusation of non-patching of holes is at very best a shoddy device for creating fraudulent back charges and justifying your absolute nonpayment, despite your protestations of overpayment. On-site inspection over this weekend categorically belies your Friday allegation. Any holes we have created

we have patched. Holes that were created by others, we do not intend to patch. I think you ought to know what you are talking about regarding damages that we have created before you attempt to oppress us with *fraudulent back charges*.

Now let me categorically state where we are regarding some of the other discussions. Final resolution can only be payment of what is justifiably due at this time. I have had Zelnick, Sobelman & Company, my accountants, a division of Margolis and Company, who certainly handle enough builders to know what they are doing, analyze your "schtick" and the conclusions are as follows:

> On two projects, Chapel Manor and College Hill, we recognize what is taking place, and we have brought this to your attention in our May 17, 1984 letter, and resent being involved in this kind of malallocation contrary to law. On four payments received with regard to the Chapel Manor project, which were marked College Hill project and Manahawkin project respectively, at your insistence by virtue of the transmittal letters, were credited toward the Chapel Manor project, irrespective of the fact that your checks indicated College Hill and Manahawkin. It seems that you are attempting to utilize and have us participate in that kind of activity and leveraging and, in reality, are proceeding to other projects without having satisfied the obligations of those that we have fairly completed. It is not a role that I enjoy allowing my company to be involved in. So under the circumstances, since you have chosen to send us — before we even had an answer to respond and communicate — a self-serving telegram at 5:20 p.m., which we had read to us — let me now give you my answer to your self-serving telegram.

I. Get ready to open all your books on pre-trial discovery, and I am confident H.U.D. will have more than an incidental passing interest in your fiscal manipulation which now we know is anything but legal and ethical even for you.

II. In terms of special design by Bob Barton on behalf of your company on the Pleasantville job, please beware that the

plans are our work product and only to be used by us. Any effort to allow others to use these plans will result in an injunction in the nature of a temporary restraining order by a court of competent jurisdiction. Despite your representation that there are no duct drawings for Pleasantville, they are in reality completed and approved and we disallow you to use those with any other HAV contractor and they, like any other demand made are subject to *fiscal resolution*.

Since you are in the habit of oppressing my company and my people and think, you can buffalo us into additional work by owing work for jobs completed and, therefore, putting us in the untenable posture of having those moneys at risk if we do not continue with the next project. I now give you this mandate unequivocally so that you will know that I will mean business. On Thursday, July 6, Mr. Brusco and I will meet with HUD to file our formal complaints regarding your activities and manipulations and for determination of whether your demands on HUD and the drawdown of your money balances out with our receipts.

III. On Friday, 10:30 a.m., I will be in Montgomery County courthouse applying to the Motion Judge, Honorable Anthony Scirica, for a Temporary Restraining Order on all your projects until the validity of the dollar distributions are ascertained by our inspection and by our accountants and if it required federal court involvement, so be it. I will further request the judge to grant me in that temporary restraining order an order forcing you to cease and desist on all building projects both in state and out of state until all contractors and indebtednesses are fairly ascertained and the present capacity of Marshall-Silver Construction Company, Inc., and Marshall-Silver and individual and Herbert Victor, who seems to be speaking as if he has an equity position, are further determined, and the present capacity of the company can be evaluated by an equity judge. I will additionally request from the United States Attorney, because of the interstate nature of your operation an immediate investigation of how you really acquired 30% equity position in the Manahawkin project and request proof of payments that you have made to acquire the same and further

reveal the discovery of other principals who have unjustly enriched themselves by the withholding of dollars from suppliers and contractors such as we.

Contemporaneously, I believe it would be appropriate to move for the appointment of a receiver by virtue of the fact that I really believe you have total fiscal instability and unreliability and that fiscal manipulation to the detriment of contractors, union workmen and the prime lenders is the way you operate. Until I see a demonstration of your independent fiscal capacity to pay, irrespective of whether we are paid or not, which is the standard that you uttered in the presence of Mr. Brusco and myself with the assent of your echo, that "we will only get paid if you get paid" and nobody on the "Silver project gets paid unless you get paid," we will see whether that is the standard which a court will allow you to continue.

Mr. Silver, you may up to now have gotten away with the shouting and the screaming and with the letter writing and with the short changing and making people crawl for their money, but I am committed to either have you meet your obligation and sit down with us and deal with us on the level that you are unaccustomed obviously to dealing, or taking you for the long walk to the cleaners and as you know as a businessman, sometimes it is great to cut your losses, but if I cut our losses, I assure you we will not go unpaid. We may not get paid in money, but we will get paid in the visceral good feeling that we have taken you out of the market and prevented you from further victimizing honest businessmen. If you think, this letter was written in anger, it was not. It was written after careful deliberation and evaluation of what you people really appear to be doing. I told you you may have gotten away with pushing people around in the past, but you are now going to try me for size and that is something you may not be ready for. If you wish to avoid the steps that I intend sincerely to take, you can present yourself in *my* office on Thursday at 10:00 a.m. and please do not bring your echo, he has demonstrated his skills in the way he operated Henry Ford Electric. He lends no dignity to any conversation or potential resolution. Otherwise, we will be at HUD timely and the court and that is the beginning of your end

and that, my friend, is my response to your self-serving and rather stupid Western Union telegram of 5:20 p.m. 6/29/84, a written copy of which we have *not yet received*.

Sincerely,

/s/
M. Mark Mendel
Chairman of the Board
Barton Engineering Company

MMM/cb

M. Mark Mendel, Ltd.
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1620 Locust Street
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July 3, 1984

Mr. Mark I. Silver, President
Marshall-Silver Construction Company, Inc.
50 Monument Road — Suite 305
Bala Cynwyd, PA 19004

Dear Mr. Silver:

Your epistle of July 2, 1984, which is again a continuation of your own stupidity and cunning deviousness whereby you accuse us of having threatened bodily harm is a total and absolute lie and, of course, your "Charlie McCarthy" would swear to it. But that, of course, is a matter of integrity. I indicated to you to take cover, which is the legal term for curing your deficiencies any way you can.

Your letter is not acceptable to me since you do not address yourself to the questions, and if you will present yourself in my office as requested by the previous letter and have a change of attitude and begin to do business on a specific level, I may in fact talk to you. Otherwise, I assure you, and this is a threat, and don't kid yourself; your attorney may have told you I can't shut you down, but I'll shut you up and I'll finish you off in the building business.

I do intend to let the Joint Building Trades Council know about these performances and you are fully aware of the fact that I am close to them and I do intend to let them know that you

were contemplating a non-union job, a fact that I have checked on and am totally aware of.

Play each and every one of your cards. It still stands. The HUD appointment and Montgomery County go into action unless you show up here with "the checks that you had ready yesterday for Dave" as well as an explanation and new ground rules. Your letter is not acceptable to me. As a matter of fact, it is a continuation of the prior stupidity, which we will not be party privy to nor continue with. We are at Manahawkin. We have not abandoned any jobs but you are forcing us to do so by your tactics.

You have one single option and one only. It is my office or suffer the wrath and take your licking, which I assure you you are going to get. In my offices, I will not leave doors open in order to tape conferences nor will we need others involved to lend credibility to what didn't happen. However, be mindful of the fact that your concern about bodily threats is in your mind and there must be a reason for your deep concern because I am sure there must be enough people out there who are desirous of hurting you physically for what you have done to them so we don't get to that point. I am trying to deal with you on a reasonable business level and you are still busily trying your "schtick" with this kind of garbage. You ought to try growing up and you may indeed become successful.

In the meantime, if your lawyer chooses, have him get ahold of me. I'll take him with me to HUD and I'll take him with me to Montgomery County.

Very truly yours,

/s/
M. Mark Mendel

MMM/cb

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.	:	CASE NO.: 84 04446

INVOLUNTARY CASE: CREDITOR' PETITION

1. Petitioners, Barton Engineering, of 545 Orianna Street, Philadelphia, Pennsylvania, 19004, and R. J. Skelting Company of P.O. Box 503, Allentown, PA, 18105, and Nester Brothers of 323 Washington Street, Pennsburg, PA, 18073, are creditors of Marshall-Silver Construction Company, Inc. of 50 Monument Road, Bala Cynwyd, Montgomery County, Pennsylvania, holding claims against the debtor, not contingent as to liability, amounting in the aggregate, in excess of the value of any lien held by them on the debtor's property securing such claims, to at least $5,000. The nature and amount of petitioners' claims are as follows:

a. Barton Engineering	$108,185.31
b. R. J. Skelting Company	48,000.00
c. Nester Brothers	36,000.00

2. The debtor's principal place of business has been within this district for the 180 days preceding the filing of this petition.

3. The debtor is an entity against whom an order for relief may be entered under title 11, United States Code.

4. The debtor is generally not paying its debts as they become due as indicated by the following: it has failed and refused to make payment on the above debts and others known to Petitioner for an excess of 6 months despite completion of all work.

WHEREFORE, petitioners pray that an order of relief be entered against Marshall-Silver Construction Company under chapter 7 of title 11, United States Code.

Signed: /s/
DANIEL E. MURRAY
Attorney for Petitioners

Address: 1620 Locust Street
Philadelphia, PA 19103

I, Pete Brusco of Barton Engineering, one of the petitioners named in the foregoing petition, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on 12-21-84.

Signature: /s/ _____
Petitioner

Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.,
AND
SILVER CONSTRUCTION, INC.,

Petitioners,

v.

M. MARK MENDEL, Individually
DANIEL E. MURRAY, Individually, and
M. MARK MENDEL, Limited,

Respondents.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision by a unanimous panel of the Court of Appeals for the Third Circuit affirming the dismissal of a RICO claim which alleged only a single victim, a single injury, and a single, short-lived scheme with only a single active perpetrator mandates the issuance of a Writ of Certiorari?

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IN THE

Supreme Court of the United States

No. 87-1358

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.,
and
SILVER CONSTRUCTION, INC.,

Petitioners,

v.

M. MARK MENDEL, Individually
DANIEL E. MURRAY, Individually, and
M. MARK MENDEL, Limited,

Respondents.

BRIEF IN OPPOSITION

Respondents M. Mark Mendel, Daniel E. Murray and M. Mark Mendel, Ltd.[1] respectfully request that the Court deny Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the unanimous panel of the Court of Appeals for the Third Circuit is reported at 835 F.2d 63 (3d Cir. 1987), and the slip opinion is reprinted in the Petition Appendix. The District Court's bench ruling and Order are not reported but are included in the Petition Appendix.

[1] Pursuant to Rule 28.1, defendants state that M. Mark Mendel, Ltd. is the only corporate respondent. M. Mark Mendel, Ltd. has no parent companies, subsidiaries or affiliates.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 9, 1987, and a petition for rehearing *en banc* was denied on January 5, 1988. This Court has jurisdiction to hear the Petition pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§1961-1968, as amended (RICO).

The relevant sections of this statute are set forth in the Petition.

STATEMENT OF THE CASE

This action arises from the failed business of petitioners Marshall-Silver Construction Company, Inc. ("Marshall-Silver") and Silver Construction Inc. ("Silver Construction") (¶16).[2] Respondents, M. Mark Mendel and Daniel E. Murray are lawyers admitted to practice in Pennsylvania and employees of respondent M. Mark Mendel, Ltd., a Philadelphia lawfirm.[3]

From 1983 to 1984, Marshall-Silver was in business as a general contractor for construction projects (¶¶16, 18). Defendants' client, Barton & Co. ("Barton") was a subcontractor on several of Marshall-Silver's projects (¶21). During 1984 several disputes arose between Marshall-Silver and Barton relating to Marshall-Silver's refusal to pay Barton for completed work (Exhibits "A" and "B" to the Complaint; *see* App. at A-14, A-20).[4] After a June 29, 1984 meeting (¶24), Mr. Mendel wrote strongly worded demand letters dated July 2 and 3, 1984, demanding on behalf of his client Barton

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[2] Paragraph references are to the complaint.

[3] For referencing ease the parties are referred to hereafter in their respective positions below; petitioners as plaintiffs and respondents as defendants.

[4] Also in 1984, Marshall-Silver changed its name to Silver Construction, and then later changed it back to Marshall-Silver after a new corporation, also known as Silver Construction Inc., had been formed (¶16). Marc I. Silver, a plaintiff in a related lawsuit was the sole owner of both corporations. *See infra* notes 9 and 10.

that Marshall-Silver pay Barton (Exhibits "A" and "B" to the complaint, *see* App. at A-14, A-20).[5] Approximately six months later when Marshall-Silver still had not paid Barton, defendants, on behalf of Barton and two other Marshall-Silver creditors, filed a Petition for Involuntary Bankruptcy against Marshall-Silver in the United States Bankruptcy Court for the Eastern District of Pennsylvania on December 28, 1984 (¶¶37, 39; *see* App. at A-22).[6] The Bankruptcy Court set bonds on the petition totalling $850,000 (¶42). The petition was dismissed on February 8, 1985, after the petitioning creditors did not post the bonds (¶43).

After the petition was dismissed, Marshall-Silver filed a complaint against Barton and the other petitioning creditors in Bankruptcy Court, (the "Bankruptcy Complaint"), pursuant to 28 U.S.C. §§157, 1334 and Section 303(i) of the Bankruptcy Code, 11 U.S.C. §303(i) (Bankruptcy Complaint ¶5). The conduct and injuries alleged, and damages sought in the complaint dismissed in this action are virtually identical to those alleged in the Bankruptcy Complaint.[7] The bankruptcy case has been tried and is pending disposition.[8]

While the bankruptcy action was pending, plaintiffs filed this lawsuit charging defendants with violations of RICO and various state laws.[9] On defendants' motion, the District Court dismissed

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[5] Plaintiffs did not allege any injury resulting from the demand letters.

[6] The filing of the bankruptcy petition, along with the resultant publicity in the trade, was the only act of defendants alleged to have caused plaintiffs any harm. (¶¶37, 44-46, 59, 63, 65).

[7] *Compare* ¶¶66, 69, 37, *with* Bankruptcy Complaint ¶¶28, 49, 60; *and* ¶¶37, 46, 57(3), 63, *with* Bankruptcy Complaint ¶¶27(c), 47(c), 41, 40, 42, 27(a), 47(a), 27(b), 47(b); *and* ¶46, *with* Bankruptcy Complaint ¶¶40-41.

[8] The bankruptcy action, captioned *Marshall-Silver Construction Company, Inc. v. Barton & Co., Nester Brothers, Inc., R.J. Skelding Co., Inc.*, No. 85-0300 (Bankr. E.D. Pa.) was tried in the United States Bankruptcy Court for the Eastern District of Pennsylvania before the Honorable Emil P. Goldhaber. All parties submitted proposed findings of fact and conclusions of law. Judge Goldhaber retired from the bench without ruling.

[9] Jurisdiction in this action was founded solely on federal question jurisdiction premised on the RICO claim. A virtually identical complaint to the one dismissed and appealed here was filed by plaintiffs' principal, Marc I. Silver, individually, and is pending before the United States District Court for the Eastern District of Pennsylvania under the caption *Marc I. Silver v. M. Mark Mendel, Daniel E. Murray, and M. Mark Mendel, Ltd.*, Civil Action No. 86-7104 (E.D. Pa.) (the "*Silver* action"). In addition to RICO, jurisdiction in the *Silver* action is premised

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plaintiffs' RICO claim and dismissed plaintiffs' pendent state law claims without prejudice for plaintiffs to bring them in a proper forum.

A unanimous panel of the Court of Appeals for the Third Circuit affirmed, holding that plaintiffs' allegations of "a single victim,[10] a single injury, and a single, short-lived scheme with only two active perpetrators,"[11] did not constitute a pattern of racketeering.[12] *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 67 (3d Cir. 1987). Plaintiffs' petition for rehearing *en banc* was denied.

ARGUMENT

Plaintiffs urge the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to address a conflict among the courts of appeals in interpreting the requirement of a "pattern of racketeering activity" under RICO, 18 U.S.C. §1962(c). This case is ill-suited for resolving the pattern question, however, because none of the various approaches of the courts of appeals would find a RICO pattern based on plaintiffs' allegations of a single victim, a single injury, and a single, short-lived scheme with

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on diversity of citizenship. The RICO claim and several state law claims in the *Silver* action were dismissed on the merits, and that action is awaiting trial in district court on plaintiffs' state law claim of wrongful use of civil proceeding.

[10] Marc I. Silver was the principal and/or sole owner of both Marshall-Silver and Silver Construction. (¶24; *Silver* action complaint ¶16). Moreover, the complaint does not allege any action taken by defendants with respect to Silver Construction, or any injury suffered by Silver Construction. Thus, the complaint alleges a single victim—Marshall-Silver.

[11] The Mendel lawfirm was alleged to have participated in the affairs of Barton only through the activities of Messrs. Mendel and Murray. *See Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 67 n.4 (3d Cir. 1987). Similarly, the only substantive allegation against defendant Murray was that he signed the Petition for Involuntary Bankruptcy (¶¶37, 39). This solitary allegation of a single predicate act cannot support a RICO claim against Mr. Murray. Thus, the complaint alleged only a single active perpetrator.

[12] Plaintiffs place great emphasis on their "offer" to amend the complaint; an issue that never was properly before either the District Court or the Court of Appeals. Plaintiffs never filed a motion seeking leave to amend. Moreover, as is discussed below, *see infra* note 27, the new allegations offered by plaintiffs add nothing to their RICO claim.

only a single active perpetrator.[13] Every court of appeals that has rendered an opinion on the factors which satisfy the elements of a RICO claim would dismiss this case because plaintiffs' allegations fail to meet its standards. The Writ, therefore, should be denied because this case does not hone the issue sufficiently for meaningful resolution by the Court.

A. *The "Pattern" Requirement*

RICO provides a private civil right of action to "any person injured in his business or property. . . ." 18 U.S.C. §1964(c). Plaintiffs' complaint purported to allege a RICO claim pursuant to 18 U.S.C. §1962(c) (¶83), which renders unlawful the conduct of an enterprise through a "pattern of racketeering activity." A "'pattern of racketeering activity' requires at least two acts of racketeering activity. . . ." 18 U.S.C. §1961(5). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court explained that the definition contained in section 1961(5) "states that a pattern '*requires* at least two acts of racketeering activity'. . . not that it 'means' two such acts." *Id.* at 496 n.14 (emphasis in original).

> The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern."

Id. The Court then challenged the lower courts and Congress "to develop a meaningful concept of 'pattern'" to combat "the 'extraordinary' uses to which civil RICO has been put." *Id.* at 500.

Towards this end the Court offered the following guidance: "The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern." *Id.* at 496 n.14.

Among the sources the Court looked to was the Senate Report emphasizing that RICO: 1) was not directed at sporadic activity; 2) required a threat of continuing activity to be triggered; and 3) required continuity plus relationship to satisfy the pattern requirement.

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[13] Moreover, although different courts of appeals historically have adopted varied and sometimes conflicting approaches to pattern, a consensus is emerging among the courts of appeals that adopts a case-by-case analysis of a variety of factors to determine whether the conduct alleged constitutes a pattern of racketeering activity.

> As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969)(emphasis added).

Id.

The Court also found instructive the statements of Representative Poff that RICO is "not aimed at the isolated offender," and Senator McClellan, the sponsor of the Senate bill, that "pattern" requires relationship among the acts and two acts standing alone are insufficient.

> Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665.

Id.

The Court also directed attention to the definition of "pattern" given in a later section of the same bill. This definition requires that the acts have the same or similar: 1) purposes, 2) results, 3) participants, 4) victims, 5) methods of commission, or 6) otherwise are interrelated and 7) are not isolated events.

> Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. §3575(e). This language may be useful in interpreting other sections of the Act.

Id. (citation omitted).

Since *Sedima*, the courts have taken up the cudgel of fashioning a meaningful concept of "pattern."[14] Eleven courts of appeals have addressed the issue.[15]

B. *The Writ Should Be Denied Because Plaintiffs' RICO Claim Would Fail Under Any of the Courts of Appeals' Approaches to Pattern*

In analyzing "pattern" the courts have focused on *Sedima*'s emphasis of "continuity plus relationship." Although different courts of appeals evaluate different factors and weigh them differently, the consensus emerging from the eight courts of appeals for the First, Third, Fourth, Seventh, Ninth, Tenth, Eleventh, and the District of Columbia Circuits eschews any litmus test measure of pattern in favor of a case-by-case factual analysis of many factors to determine continuity plus relationship.[16] These factors include: the number, character, and variety of the predicate acts; whether the predicate

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[14] Congress also has carried the torch. In the 99th Congress H.R. 5445, which passed the House of Representatives by a vote of 371 to 28, *United States House of Representatives Legislative Calendar, Committee on the Judiciary*, 99th Cong., 1st Sess. 205 (1986), would have amended section 1962(c) and legislatively defined pattern to require multiple, divisible criminal episodes. Although this bill ultimately died in the Senate Judiciary Committee, H.R. 3240 which currently is before Congress incorporates this idea and would amend section 1961(6) to define pattern as requiring that the predicate acts not be "so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim. ... ."

Also pending in this 100th Congress are H.R. 2983 and parallel S. 1523. These bills would amend section 1964(c) to curtail substantially the availability of a private right of action under RICO.

Thus, Congress is working on the very legislative question that plaintiffs suggest the Court resolve judicially, and Congress has proposed resolutions very different from that urged by plaintiffs.

[15] The Court of Appeals for the Sixth Circuit has not addressed the pattern question since *Sedima* was decided.

[16] *First Circuit. See Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) ("no one characteristic can be considered as controlling in determining whether a pattern exists").

Third Circuit. See, e.g., Marshall-Silver Construction Co. v. Mendel, 835 F.2d 63, 66 (3d Cir. 1987) (discussing factors relevant to case-by-case analysis); *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 40 (3d Cir. 1987) ("We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be 'continuous.' This determination necessarily depends on the circumstances of the particular case.")

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acts were in pursuit of a single objective or multiple objectives; the time period over which the acts were committed; the similarity of the acts; the number of victims; the number of perpetrators; the number of injuries; the context in which the acts were committed; the presence of separate schemes; whether the scheme was open-ended; and whether the acts were discrete or merely preparatory to a single offense.

Although the Court of Appeals for the Second, Fifth and Eighth Circuits have not formally adopted this consensus approach, the Court of Appeals for the Second Circuit gives consideration to these same factors in its analysis of "enterprise" under RICO, the Court of Appeals for the Fifth Circuit has reconsidered its approach, and even plaintiffs concede that this case would fail to meet the criteria of "pattern" adopted by the Court of Appeals for the Eighth Circuit. Plaintiffs' allegations of a single victim, single injury, and a single, short-lived scheme with only a single active perpetrator, therefore,

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Fourth Circuit. See, e.g., Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987) (no mechanical test can determine the existence of a RICO pattern; the question necessarily is a matter of criminal dimension and degree to be decided on a case-by-case basis); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 706 (1988) (case-by-case standard looking to criminal dimension and degree).

Seventh Circuit. See, e.g., Liquid Air Corp. v. Rogers, 832 F.2d 1297, 1304 (7th Cir. 1987) ("fact-specific inquiry, in which no single factor" determinative); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (existence of pattern "fact specific question encompassing many relevant factors").

Ninth Circuit. See, e.g., Medallion Television Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360, 1363 (9th Cir. 1987) ("The circumstances of the case. . . must suggest that the predicate acts are indicative of a threat of continuing activity"); *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987) (examine predicate acts to see whether isolated or sporadic).

Tenth Circuit. See, e.g., Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) ("we decline to go beyond the facts before us to formulate a bright-line test in the abstract").

Eleventh Circuit. See Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986) (analyzing number and type of acts, parties, time period, and purposes).

District of Columbia Circuit. See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, No. 86-5135 (D.C. Cir. February 12, 1988) (available on LEXIS) (analyzing number of acts, victims and perpetrators, type of acts, time period and goal).

would fail to establish a pattern under the approaches of each of the eleven courts of appeals that have addressed the question.

1. *The Consensus Courts*

Although the eight courts of appeals that utilize a case-by-case factual analysis of pattern vary in the weight they give to specific factors, plaintiffs' allegations would not establish a pattern under any approach.

First Circuit. In *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (lst Cir. 1987), the Court of Appeals for the First Circuit held that racketeering acts "do not constitute a pattern simply because they number two or more. The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence." *Id.* at 30. Applying this standard the Court found that a single bribe paid in three installments and which involved eleven telephone calls and eight letters did not constitute a pattern of racketeering activity. *Id.* at 31. Similarly, here plaintiffs' allegations of two letters, a single meeting and the filing of a single pleading, all with the single alleged purpose of putting Marshall-Silver out of business would not constitute a pattern of racketeering activity under the approach of the Court of Appeals for the First Circuit.

Third Circuit. The Court of Appeals for the Third Circuit analyzes pattern by evaluating such factors as: 1) the number of unlawful acts, 2) the length of time over which the acts were committed, 3) the similarity of the acts, 4) the number of victims, 5) the number of perpetrators, and 6) the character of the unlawful activity. *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 66 (3d Cir. 1987); *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987). *See Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1355 (3d Cir. 1987). Applying this analysis to this case the Court held that plaintiffs' allegations of "a single victim, a single injury, and a single, short-lived scheme with only two active perpetrators,"[17] *Mendel*, 835 F.2d at 67, failed to establish a pattern of racketeering activity. *Id.*[18]

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[17] *See supra* note 11.

[18] Plaintiffs erroneously suggest that the Court of Appeals' decision in *Mendel* is inconsistent with decisions of other panels of that Court. Not only would such an intramural conflict be an insufficient basis for granting the Writ, *see Davis v. United States*, 417 U.S. 333, 340 (1974), but no such conflict exists.

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Fourth Circuit. The Court of Appeals for the Fourth Circuit has adopted a pattern analysis that inquires into "criminal dimension and degree." *International Data Bank Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987). Under this analysis "the predicate acts must be related and must be part of a continuous criminal endeavor." *Id.* at 154. In *Zepkin*, the Court of Appeals found that:

> There must be some indication of a "threat of continuing activity" by the defendants, not just one instance of fraud with a single victim.

Id. at 155 (quoting *Lipin Enterprises v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986)). Here plaintiffs alleged no more than

> a single, non-recurring scheme to defraud a single entity. . . in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in *Zepkin* was found wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a RICO pattern of racketeering activity.

Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987).[19] Here again, plaintiffs' allegations of a single scheme, over a short period of time,

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Given the factors that the Court considers it is not surprising that it found that plaintiffs' allegations here of a single victim, a single injury, and a single, short-lived scheme with only one active perpetrator did not constitute a pattern, while finding in other cases: fraud by several individuals and two separate entities in marketing oil and gas limited partnerships, involving repetition of similar misrepresentations to more than twenty investors and considerably more than two acts of mail fraud did constitute a pattern, *Barlicheck*, 832 F.2d at 39; four people acting in concert over a long period of time, participating in two separate schemes to bribe city officials, and paying the bribes in multiple installments to assure that the municipal decisional process was corrupted at every stage, satisfied the pattern requirement, *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987); or defrauding numerous persons with respect to materials and services for eighty oil wells owned by nineteen parties and serviced by a twentieth, over a period of eleven months as part of work done under two separate contracts pertaining to different time periods constituted a RICO pattern. *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1355 (3d Cir. 1987).

[19] *See also HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 706 (1988) (no pattern in single scheme extending more than four years and involving numerous predicate acts aimed at corrupting political processes to gain competitively advantageous zoning and condemnation rulings).

with a single perpetrator and a single victim also would fail to pass muster as a RICO claim under the test of the Court of Appeals for the Fourth Circuit.

Seventh Circuit. In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Court of Appeals for the Seventh Circuit held that an ongoing fraudulent scheme to defraud investors spanning approximately four years, involving several acts of mail fraud relating to two separate foreclosure sales occurring two years apart and others relating to the initial loan transaction, satisfied RICO's pattern requirement. *Id.* at 976. The Court adopted a case-by-case approach holding that a pattern required that the predicate acts "be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions "somewhat separated in time and place." ' " *Id.* at 975 (citations omitted). Factors to be considered in the pattern analysis "include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Id.* Using the analysis employed in the Seventh Circuit, plaintiffs' allegations here of a single victim, a single injury, and a single, short-lived scheme with only one active perpetrator, would fail to constitute a pattern.[20] *See Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th

[20] Plaintiffs erroneously suggest that the Court of Appeals for the Seventh Circuit may be shifting away from the analysis enunciated in *Morgan*. The Court of Appeals for the Seventh Circuit, however, consistently has followed *Morgan* using its case-by-case analysis and looking at the factors discussed in *Morgan*. *See, e.g., Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304-05 (7th Cir. 1987) (nineteen separate acts resulting in repeated infliction of distinct economic injuries sufficient to establish pattern); *Appley v. West*, 832 F.2d 1021, 1027-28 (7th Cir. 1987) (predicate acts causing discrete injuries sufficient for pattern); *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477, 479 (7th Cir. 1986) (multiple predicate acts over a two month period, relating to same transaction, involving single victim, and inflicting single injury does not establish a pattern); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1112 (7th Cir. 1987) (mailing of false tax schedules to former partner on two occasions, filing false partnership tax returns, and denying former partner information and documents over a period of several months and relating to a single scheme to defraud a single victim in a "one-shot" effort to inflict a single injury do not comprise a pattern); *Elliott v. Chicago Motor Club Insurance*, 809 F.2d 347, 350 (7th Cir. 1986) (several acts of mail fraud over several years in furtherance of scheme to defraud five family members injured in car accident does not constitute pattern because all claims arose out of same accident and same insurance policy); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) (at least twelve separate acts of mail fraud relating to various items in sale of business not a pattern because all designed to defraud one victim on one occasion).

Cir. 1987); *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477 (7th Cir. 1986).

Ninth Circuit. The Court of Appeals for the Ninth Circuit applies a case-by-case analysis of predicate acts to determine whether the acts were isolated or sporadic, *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), or whether there is a threat of continuing activity. *Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1364 (9th Cir. 1987). "[D]iscreet [sic] activity which has a distinct and easily defined beginning and end, even though supported by several alleged predicate acts of mail and wire fraud" does not constitute a pattern of racketeering. *Jarvis v. Regan*, 883 F.2d 149, 153 (9th Cir. 1987).

In *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), the Court held that, as here, a single fraudulent purpose perpetrated on a single victim did not satisfy the pattern requirement. *Id.* at 1399. In *California Architectural Building Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698, 699 (1988) the Court described its holding in *Schreiber:*

> we held that plaintiffs failed to state a RICO claim by alleging acts of mail or wire fraud relating to the diversion of a single shipment of products. . . . That was a single fraud perpetrated on a single victim.

Id. at 1469 (citation omitted). Applying the standard of the Court of Appeals for the Ninth Circuit to the facts alleged by plaintiffs here: "This case involved but a single alleged fraud with a single victim." *SelecTV*, 833 F.2d at 1364. Therefore, as there was no threat of continuing activity, there was no pattern. *Id.* at 1363-64. Once again, the allegations here of a single short-lived scheme and a single victim would fail to measure up against the criteria established by the Court of Appeals for the Ninth Circuit.

Tenth Circuit. Although the Court of Appeals for the Tenth Circuit has not stated what is a RICO pattern, it has applied a case-by-case factual analysis to determine what is *not* a pattern. *Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212, 214 (10th

Cir. 1987).[21] The allegations of plaintiffs' complaint here fit well into the holdings of the Court of Appeals for the Tenth Circuit:

> A scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished.

Torwest, 810 F.2d at 928-29; *Garbade*, 831 F.2d 214. In *Torwest*, *Garbade* and here there is nothing from which there could be inferred a continuing scheme. The continuity element is absent here. Thus, plaintiffs allegations of a single objective to drive Marshall-Silver out of business over short duration with a single victim and a single perpetrator would not meet the pattern standard of the Court of Appeals for the Tenth Circuit.

Eleventh Circuit. Although the Court of Appeals for the Eleventh Circuit has not explicitly stated its pattern analysis, in *Bank of America National Trust and Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), the Court discussed the definition of pattern provided in 18 U.S.C. §3575(e) and analyzed the number and type of predicate acts, the scope and duration of the scheme, and the number and type of victims. Using this analysis, the Court held that nine separate acts of mail and wire fraud over three years, involving numerous false financial statements, inducing five banks to extend $60 million in credit to a firm on verge of bankruptcy, satisfied the pattern requirement. Applying this analysis to the complaint here, the single victim, single injury, and single, short-lived scheme with only one active perpetrator pled by plaintiffs does not constitute a pattern.

District of Columbia Circuit. Although the Court of Appeals for the District of Columbia Circuit has not faced the pattern question squarely, it recently discussed the pattern requirement. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, No. 86-5135 (D.C. Cir. February 12, 1988) (available on LEXIS). In *Yellow Bus*, the trial court had dismissed the RICO claims prior to this Court's decision in *Sedima*. Although the discussion of pattern is fleeting (apparently the question of pattern was not raised by the parties in either the District Court or the Court of Appeals), the

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[21] *See Condict v. Condict*, 826 F.2d 923 (10th Cir. 1987); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).

Court looked to 18 U.S.C. §3575(e) for guidance and found that multiple perpetrators committing ten predicate acts of vandalism and intimidation against multiple victims, appeared to meet the pattern requirement. Again, plaintiffs' allegations of a single victim, single injury, and a single short-lived scheme with only one active perpetrator would fail to establish a pattern under this test.

2. *The Other Circuit Courts of Appeals*

Although the Courts of Appeals for the Second, Fifth and Eighth Circuits have not formally adopted the case-by-case factually oriented approach of the other courts of appeals, the Court of Appeals for the Second Circuit subsumes its inquiry of continuity plus relationship into its analysis of enterprise, and the Courts of Appeals for the Fifth and Eighth Circuits have expressed interest in abandoning their more rigid applications in favor of the consensus analysis. Even under their current formulations, however, each of these courts of appeals would find that plaintiffs' allegations are insufficient to establish a RICO pattern.

Second Circuit. Although plaintiffs' petition correctly cites the "pattern" test of the Court of Appeals for the Second Circuit and correctly notes that here substance is given to the continuity concept through the analysis of enterprise, plaintiffs leave the mistaken impression that the allegations here would meet the test in the Second Circuit.[22] The Court of Appeals for the Second Circuit gives content "to the factor of 'continuity plus relationship' discussed in *Sedima* through [its] interpretation of the 'enterprise' element of RICO, 18 U.S.C. §§1961(4), 1962(c)," *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988), recognizing that this departure is one of form not substance. *Id.; United States v. Ianniello*, 808 F.2d 184, 191 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). In order to establish a RICO enterprise a plaintiff must prove that the associates function as a continuing operation and that the predicate acts are related to their common purpose. *Id.; Beck*, 820 F.2d at 51. *See also United States v. Benevento*, 836 F.2d 60, 72 (2d Cir. 1987).

> As *Ianniello* recognized, whether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance. . . . A

[22] Petition at 11-12 and n.7 and n.8.

> consequence of that observation for this case is that with the elimination of Phase I from consideration, the enterprise alleged by plaintiffs had but one straightforward, short-lived goal, the sale of the U.S. collateral at a reduced price. At the conclusion of the sale, the alleged enterprise ceased functioning.

Beck, 820 F.2d at 51 (citation omitted). Under the approach in the Second Circuit, therefore, where as here "the enterprise alleged by plaintiffs had but one straightforward, short-lived goal"—putting Marshall-Silver out of business—"[s]uch an association is not sufficiently continuing to constitute an 'enterprise'. . . ." *Beck*, 820 F.2d at 51. Thus, plaintiffs' RICO claim fails under the analysis used by the Court of Appeals for the Second Circuit.

Fifth Circuit. Plaintiffs argue that *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), holding that two related predicate acts sufficed to allege a RICO claim, is "[t]he leading case" in the Fifth Circuit. Petition at 13. *R.A.G.S.*, however, does not present a viable conflict because it has been drained of its vitality by subsequent decisions of the Court of Appeals for the Fifth Circuit.

R.A.G.S. was decided within three months of *Sedima*, and completely ignored the continuity requirement of *Sedima*. Ever since *R.A.G.S.*, the Court of Appeals for the Fifth Circuit has been moving away from it. In *Smoky Greenhaw Cotton v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274 (5th Cir.), *rehearing denied*, 785 F.2d 1282 (5th Cir. 1986), the Court of Appeals directed the trial court to consider carefully on remand the facts as developed with respect to the pattern requirement as enunciated by this Court in *Sedima*.

> In *Sedima*, however, the Supreme Court appeared to challenge the lower courts to develop a more rigorous interpretation of "pattern." 105 S. Ct. at 3285 n. 14, 3287, 87 L.Ed.2d at 358 n. 14, 361. Responding to or anticipating this challenge, a number of lower courts have rejected the earlier broad interpretations of pattern. . . . Given the present state of the record, we are not required to pass on this issue and express no opinion at this time. Should Greenhaw elect to

> retry the RICO claim, the District Court will have to consider carefully the meaning of the "pattern of racketeering activity" in the context of the facts actually developed.

Id. at 1280-81 n.7 (citations omitted).

Moreover, Judge Politz, a member of the *R.A.G.S.* panel, was a member of the panel in *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987), one of two panels that urged that *R.A.G.S.* be overruled *en banc*,[23] and wrote the opinion for the Court in *Cowan v. Corley*, 814 F.2d 223 (5th Cir. 1987), one of two subsequent decisions that simply ignored *R.A.G.S.*[24] In *Cowan*, Judge Politz wrote:

> We read this language in *Sedima* to direct a narrower definition of pattern than had been sometimes employed. Consistent therewith, the district court correctly concluded that two illegal acts will not constitute a RICO pattern in every instance.

Id. at 227 (footnote omitted).

In *Montesano* the Court limited *R.A.G.S.* by applying the continuity analysis ignored in *R.A.G.S.* to the enterprise requirement.[25] *Montesano*, 818 F.2d at 426-27. In holding that an association in fact enterprise joined together to commit a discrete offense does not establish a RICO enterprise the Court noted: "Proof of a 'pattern of racketeering activity' does not necessarily establish an 'enterprise' because 'pattern' as defined by *R.A.G.S.* does not require this continuity." *Id.* at 427. Thus, these post-*R.A.G.S.* cases show a strong tilt away from the doctrinaire approach of *R.A.G.S.* and it would seem that plaintiffs' allegations here of a single, straightforward,

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[23] *See Montesano*, 818 F.2d at 426 (urging that *R.A.G.S. Couture* be replaced by a test that would recognize that a scheme to achieve a single discrete objective, even if pursued by multiple illegal acts does not constitute a pattern); *Croker v. Federal Deposit Insurance Corp.*, 826 F.2d 347, 348 n.2 (5th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3425 (December 1, 1987).

[24] *See Cowan*, 814 F.2d at 226-27. *Smoky Greenhaw Cotton*, 785 F.2d at 1280-81 n.7.

[25] This approach is similar to that of the Court of Appeals for the Second Circuit.

short-lived goal would fail to establish a RICO enterprise under the analysis of the Court of Appeals for the Fifth Circuit.[26]

Eighth Circuit. In *Superior Oil Co. v. Fulmer*, 785 F.2d 252, (8th Cir. 1986), the United States Court of Appeals for the Eighth Circuit held that continuity sufficient to establish a pattern required multiple criminal schemes or other criminal episodes. *Id.* at 257. The Court held that several related predicate acts committed over a substantial period of time did not constitute a pattern because "the record reveals one isolated fraudulent scheme." *Id.* Plaintiffs here in effect concede that their complaint alleging a single scheme to put Marshall-Silver out of business, does not satisfy the pattern test of the Court of Appeals for the Eighth Circuit.[27]

Although the Court of Appeals for the Eighth Circuit has adhered to its bright-line, multiple scheme requirement for pattern,[28] members of the Court recently have expressed an interest in reconsidering this test in light of the evolution of pattern in other courts of appeals. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648, 650, 651 (8th Cir. 1987) (McMillian, J., concurring and Gibson, J., concurring).

Thus, plaintiffs' allegations would fail under any of the approaches developed by the courts of appeals. The Writ should be denied,

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[26] Although not faced with the question in *Montesano*, the Court suggested that its continuity analysis would not apply where the enterprise alleged was a corporation. *Montesano*, 818 F.2d at 427. Although the enterprise here alleged is subject to much dispute, there is no reason to distinguish between association in fact enterprises and corporate enterprises. If the continuity analysis is to be conducted through the enterprise element of RICO, the proper inquiry is not whether the enterprise itself continues to exist, but rather whether the enterprise's unlawful activity continues.

[27] Plaintiffs mistakenly argue that *Fulmer* would permit Marshall-Silver to amend its complaint to litigate unsubstantiated claims of a separate episode. As discussed above, *see supra* note 12, plaintiffs never sought leave to amend their complaint to allege a second scheme. Thus, as in *Fulmer*, the complaint of "record reveals one isolated fraudulent scheme." 785 F.2d at 257. Moreover, the proposed second episode would involve allegations completely unrelated to and lacking in continuity with the scheme alleged in the complaint. Thus, even the "offered" amendment would fail as a matter of law. *See Mendel*, 835 F.2d at 67 n.5.

[28] *See, e.g., United States v. Kragness*, 830 F.2d 842, 851 (8th Cir. 1987) (multiple drug importation schemes satisfies pattern requirement); *Ornest v. Delaware North Companies, Inc.*, 818 F.2d 651 (8th Cir. 1987) (defrauding plaintiffs of commissions not pattern); *Holmberg v. Morrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1953 (1987) (acts taken to draw down three letters of credit one scheme and not a pattern).

therefore, because this case fails to focus any conflict among the courts of appeals.[29]

CONCLUSION

Plaintiffs' petition does not raise any questions that require this Court to settle. The Court below correctly applied the RICO statute to the facts before it. Further, there is a consensus emerging among the courts of appeals analyzing pattern on a case-by-case factual inquiry of many factors to determine continuity plus relationship. Moreover, this case is ill-suited for addressing the question of "pattern" under RICO because plaintiffs' allegations of a single victim, a single injury, and a single short-lived scheme with a single active perpetrator would not establish a pattern under the standards of any of the courts of appeals.

Thus, Respondents respectfully request that the Writ be denied.

Respectfully submitted,

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[29] The defective allegations of pattern is only one of the deficiences of the RICO allegations raised below by defendants. In addition, the complaint failed to allege a proper enterprise and did not plead actionable racketeering activity. Although these deficiencies were not addressed by the Court of Appeals, they provide independent bases for affirming the dismissal of the complaint. Thus, the Writ also should be denied because the Court need not reach the question of pattern to affirm the judgment of the Court of Appeals.

(3)

Supreme Court, U.S.
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No. 87-1358

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.,
and
SILVER CONSTRUCTION, INC.,
Petitioners

v.

M. MARK MENDEL, Individually
DANIEL E. MURRAY, Individually, and
M. MARK MENDEL, Limited,
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petition for Certiorari noted at page 9, n. 4, that, among the twelve courts of appeal, only the District of Columbia and the Sixth Circuit had not considered the pattern of racketeering question posed by footnote 14 of *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). On February 12, one day after the Petition for Certiorari was filed, the District of Columbia Court of Appeals handed down its decision in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs and Helpers Local Union 639*, 1988 Westlaw 9710 (D.C. Cir. February 12, 1988).[1] In *Yellow Bus Lines*, the Court held that a four day labor racketeering scheme with the narrowly defined goal of intimidating an employer into recognizing a union satisfied the "pattern" requirement. In so holding, the Court of Appeals aligned itself with the Second, Fourth, Fifth and Ninth Circuits in adopting the less restrictive view of the pattern requirement, *see* Petition for Certiorari, at 11-14, and further widened the differences among the eleven courts of appeal that now have considered the pattern issue in the two and one-half years since *Sedima* was decided.

Yellow Bus Lines arose out an employer's refusal to bargain with Local 639 of the Drivers, Chauffeurs and Helpers Union. The Union called a strike during which the Union's business agent and some of the strikers threatened to burn the company's buses. At the request

1. This Supplemental Brief is filed under Supreme Court Rule 22.6 which provides that "[a]ny party may file a supplemental brief while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing." Petitioners filed their Petition for Certiorari on February 11, 1988, and the *Yellow Bus Lines* decision that is the subject of this Brief was decided on February 12, 1988.

of management, the local police arrested the business agent on criminal charges stemming from the threats. After the strike was settled, the business agent brought civil claims against management for false arrest and abuse of process. Management filed counterclaims alleging civil-RICO claims and state law tort claims. In a *pre-Sedima* ruling, the trial court dismissed the civil-RICO claims for failing properly to allege the enterprise element of the claim and for failing to allege "racketeering injury". Shortly afterwards, Yellow Bus moved to amend its Complaint to cure these pleading deficiencies and the Motion was denied as "too late".

The state law counterclaims were tried and substantial verdicts were returned for the bus line. On appeal, the Court of Appeals reversed the judgment of the District Court dismissing the civil-RICO claims and refusing to permit the filing of amended pleadings.

The *Yellow Bus Lines* decision is significant in two respects. *First*, the Court considered the pattern of racketeering issue that the intervening *Sedima* decision posed. In so doing, the Court had little difficulty in concluding that four predicate criminal acts committed over a very short period of time in a single, isolated scheme to intimidate an employer in a labor dispute satisfied the pattern of racketeering guidelines suggested in footnote 14 of *Sedima*:

> "[The Complaint alleges] four . . . direct threats to Yellow Bus property or employees which qualify as offenses listed in the section 1961(1) definition of racketeering activity. Additionally, these predicate acts appear to fulfill the requirement for a 'pattern' — 'continuity plus relationship' — as stated in the Senate Report. The definition of 'pattern' of conduct, provided by Congress later in the same bill, indicates that this term embraces 'criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission . . . and are not

> isolated events." 18 U.S.C. §3575(e) (1982). See also *Sedima*, 473 U.S. at 496 n. 14. Here, appellees are accused of engaging in acts of vandalism and intimidation during a specific time period in pursuit of a unitary goal. We believe this scenario meets the statutory requirements for a 'pattern of racketeering activity'." ____ F.2d at ____ (p. 6, Westlaw opinion).

Under the *Yellow Bus Lines* analysis, the Complaint in this action indisputably would have met the pattern of racketeering requirement. Like the union thugs in *Yellow Bus Lines*, Mendel, his partners and his law firm engaged in a series of predicate criminal acts with a single goal putting Marshall Silver out of business in retaliation for its failure to pay a disputed contract claim. The only significant difference is that the respondents' scheme spanned seven months and the labor scam took place over the course of a few days.

Second, like the District Court in this case, the District Court in *Yellow Bus Lines* refused to permit the filing of amended pleadings at an early stage of the case despite the policy of liberal amendment of pleadings mandated by Rule 15, F.R.C.P. In this case, petitioners requested leave to amend the Complaint to allege that respondent Mendel had engaged in a second, separate scheme to corrupt the judicial process in the event that the court considered such activity necessary to meet the pattern of racketeering requirement. The District Court refused to permit the filing of an amended complaint, and the Third Circuit affirmed its refusal with the cryptic and flatly incorrect statement that claims of racketeering activity unrelated to petitioners "would fail, in the context of this suit, to meet either the requirement of relationship or that of continuity." *Marshall-Silver Construction Co., Inc. v. Mendel*, 835 F.2d 63, 67, n.5 (3d Cir. 1987).

For all of the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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